

ENTERED

7B.6.
MAR 15 1968

F 2302

San Francisco Law Library

436 CITY HALL


No. 188195

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

17. 3390
No. 20995 ✓

IN THE
United States
Court of Appeals
For the Ninth Circuit

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York Corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,
Appellees.

APPELLANTS' BRIEF

*Appeal from the U. S. District Court
for the District of Idaho*

HONORABLE FRED M. TAYLOR, Judge

FILED

NOV 14 1966

WM. B. LUCK, CLERK

IN THE
United States
Court of Appeals
For the Ninth Circuit

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York Corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,
Appellees.

APPELLANTS' BRIEF

*Appeal from the U. S. District Court
for the District of Idaho*

HONORABLE FRED M. TAYLOR, *Judge*

SUBJECT INDEX

<i>Subject</i>	<i>Page</i>
Statement of Jurisdiction	1, 2
Statement of Case	2 - 8
Specification of Error No. 1	8
Points and Authorities in Support of Specification No. 1	8-15
Specification of Error No. 2	15
Points and Authorities in Support of Specification No. 2	15-17
Specification of Error No. 3	17
Points and Authorities in Support of Specification No. 3	17-20
Specification of Error No. 4	20
Points and Authorities in Support of Specification No. 4	20-21
Specification of Error No. 5	21-22
Points and Authorities in Support of Specification No. 5	22-23
Specification of Error No. 6	23-24
Points and Authorities in Support of Specification No. 6	24-25
Specification of Error No. 7	25-26
Points and Authorities in Support of Specification No. 7	26
Specification of Error No. 8	26
Points and Authorities in Support of Specification No. 8	27
Argument	27-39
Conclusion	40
Table of Exhibits	42-43

INDEX OF CASES AND AUTHORITIES

<i>Cases Cited</i>	<i>Page</i>
<i>Berry v. American Cynamid Company</i> 341 Fed. Rep. 2d 14, Sixth Circuit, Feb., 1965	15
<i>Bethlahmy v. Bechtel</i> 415 P. 2d 698 (Idaho 1966)	14
<i>Bolitho v. Safeway Stores, Inc.</i> 109 Mont. 213, 95 P. 2d 443	25
<i>Boykin v. Chase Bottling Works</i> 32 Tenn. App. 508, 222 S.W. 2d 889	16, 17
<i>Brown v. Globe Laboratories</i> 165 Neb. 138, 84 N.W. 2d 151	19
<i>Ebers v. General Chemical Co.,</i> 310 Mich. 261, 17 N.W. 2d 176	19
<i>Goldberg v. Kollsman Instrument Corp.,</i> 191 NOE. 2d 81 (N.Y.)	10
<i>Gonzales v. Virginia-Carolina Chemical Company</i> 239 F. Supp. 567 (DC, SC, 1965)	19

<i>Cases Cited</i>	<i>Page</i>
<i>Gottsdanker v. Cutter Laboratories</i> 6 Cal. Rptr. 320	22, 23, 24, 36
<i>Greenman v. Yuba Power Products, Inc.</i> , 377 P. 2d 897 (Cal. 1963)	8, 11, 12
<i>Jones v. Burgermeister Brewing Corp.</i> , 198 Cal. App. 2d 198, 18 Cal. Rptr. 311	25
<i>Kelley v. John R. Daily Co.</i> , 181 P. 326, 56 Mont. 63	25
<i>Klein v. Duchess Sandwich Co.</i> 14 Cal. 2d 272, 93 P. 2d 799	25
<i>Love v. Wolf</i> , 226 ACA 482, 38 Cal. Rptr. 183 (Cal. App. 1964)	17, 19, 26
<i>Morrow v. Caloric Appliance Corp.</i> , 372 S.W. 2d 41 (Mo. 1963)	10
<i>Patterson v. George H. Weyer, Inc.</i> , 189 Kan. 501, 370 P. 2d 116	38
<i>Peterson v. Lamb Rubber Co.</i> , 54 Cal. 2d 339, 4 Cal. Rptr. 863, 353 P. 2d 575	25
<i>Roberts v. United States</i> 316 F. 2d 489 (3 Cir., 1963)	19
<i>Santor v. A & M Karragheusian, Inc.</i> , 44 New Jersey 52, 207 A. 2d 305 (1965)	11
<i>Schilling v. Roux Distributing Co.</i> , 266 Minn. 71, 59 N.W. 2d 907	38
<i>Seaton Ranch Co. v. Mont. Vegetable Oil & Feed Co.</i> , 252 P. 2d 1040	25
<i>Shipper v. Levitt and Sons, Inc.</i> , 44 New Jersey 70, 207 A.2d 314	14, 15
<i>Stromsodt v. Parke-Davis and Company</i> (N. D. 1966), 257 F. Supp. 991	18, 20, 21
<i>Vallis v. Canada Dry Ginger Ale, Inc.</i> , 190 Cal. App. 2d 35, 11 Cal. Rptr. 823	25
<i>Vassallo v. Sabatte Land Co.</i> , 212 Cal. App. 2d 11, 27 Cal. Rptr. 814	25
<i>Wright v. Massey Harris, Inc.</i> , 68 Ill. App. 2d 70, 215 N.W. 2d 465 (1966)	14
<i>Wright's v. Staff Jennings, Inc.</i> , 405 P. 2d 624 (Ore. 1965)	13

STATUTORY PROVISIONS

R. C. M., 1947, Sec. 74-321	25
Title 27, Ch. 1, including but not inclusively 27-117, of the Revised Code of Montana	25

LEGAL TEXT

1 <i>Frumer & Friedman Products Liability</i> , 382.2, Par. 16.03 (4)	23
--	----

MEDICAL PERIODICAL

<i>Journal of the American Medical Association</i> , July 8, 1961, Vol. 177, No. 1	18
---	----

IN THE
United States
Court of Appeals
For the Ninth Circuit

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York Corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,
Appellees.

APPELLANTS' BRIEF

*Appeal from the U. S. District Court
for the District of Idaho*

HONORABLE FRED M. TAYLOR, *Judge*

STATEMENT OF JURISDICTION
OF
UNITED STATES DISTRICT COURT

This is an appeal by Glynn Richard Davis and Florence Davis, husband and wife, from a Judgment entered pursuant to a jury verdict dated January 29, 1966, by the United States District Court for the Dis-

trict of Idaho, Southern Division. The cause came on for trial before the Court and a jury on January 18, 1966. Federal jurisdiction is predicated on diversity of citizenship and the required statutory claim in excess of the sum of \$10,000.00, exclusive of costs and interest. Jurisdictional facts were admitted and appeared to the Court to exist, pursuant to the Pre-Trial Order.

JURISDICTION OF COURT OF APPEALS FOR NINTH CIRCUIT TO HEAR THE APPEAL

Judgment was entered in the above-entitled action on the 28th day of January, 1966. Notice of Appeal was filed on the 14th day of February, 1966, pursuant to Title 28 U.S.C.A., Federal Rules of Civil Procedure, Rule 73(a).

APPELLANTS' STATEMENTS OF THE CASE

The Defendant, Wyeth Laboratories, a division of American Home Products, produces a product known as Sabin Oral Polio Vaccine, Type III. (P. 46, lines 10-15) Live polio virus are contained in this vaccine. (P. 446, Line 20—P. 446, line 9) Acute anterior poliomyelitis is caused by a virus which enters the human host through the mouth. Multiplication of the virus occurs in the gastrointestinal trace (P.471, lines 1-5) Medical science is unable to explain how the virus is transmitted to the anterior horn cells. Nevertheless, the virus does effect these anterior horn cells and produces the paralysis commonly referred to as polio.

During the early 1950s, the United States was faced with an outbreak of polio which took on epidemic pro-

portions. The Salk Vaccine was introduced in the early 1950s.

Salk Vaccine consists of killed polio virus. This vaccine is introduced into the human host by means of a hypodermic needle. After 1955, the Salk Vaccine was considered 100% safe. (P. 377, lines 3-6; P. 656, lines 13-15). Polio incidence continued to show a rapid decline from the introduction of the Salk Vaccine to the present date.

Clinical testing of the Sabin Vaccine commenced in the United States between 1960 and 1961. (P 581 lines 11-13) This vaccine is a live virus. (P 602, line 9 - P. 603, line 9) Supposedly it is weakened to the point that it can produce immunity but will not produce the disease itself. (P. 603, lines 6-9) The Sabin Vaccine is introduced into the human host by means of drops which are placed on a sugar cube and taken orally (Defendant's Exhibit No. 40) Shortly after the Sabin Vaccine appeared on the market, cases of paralytic polio occurring within thirty days of the administration of the vaccine began to appear. (Defendant's Exhibit 51; P. 356, lines 5-14) The Surgeon General of the United States, alarmed by this discovery, convened a special advisory committee, consisting of the leading specialists in the field of polio in the United States, to inquire into this phenomenon. (P. 355, lines 12-23) The committee determined that there was a causal connection between the vaccine and the resulting cases. (Defendant's Exhibits No. 40 and 51; P. 359, lines 20 - P. 360, line 1; P. 361, lines 21-24; P. 362, lines 12-13; P. 363, lines 10-18) This committee met five times during

1962. (P. 356, line 14) During the course of that year, they recommended that the Type III oral polio vaccine should not be administered to adults. (P. 359, lines 23-25)

The United States Government licensed the sale of oral Type III vaccine in March 1962. (P. 447, lines 1-3) Some difficulty was encountered prior to the licensing. (P. 446, lines 19-25; P. 447, lines 1-4) Three drug companies produced the oral vaccine, to-wit: Phiser, Wyeth and Lederle.

This particular case is concerned with the administration of the oral type III vaccine to Glynn Richard Davis, the Plaintiff, in West Yellowstone, Montana, during the month of March in 1963. (P. 167, lines 10-12; P. 127, lines 7-16; P. 128, lines 9-10) The history behind the mass immunization program held in eastern Idaho and West Yellowstone, Montana, is particularly important in this case. James Franklin was a territory manager for the Defendant, Wyeth Laboratories, Inc., in eastern Idaho in the year 1963. (P. 44, lines 2-4) He had been employed by Wyeth for some nine years. (P. 44, line 4) Prior to 1963, the town of West Yellowstone, Montana had been a part of his territory. (P. 45, lines 3-4) However, in 1962, this community was dropped because it did not have any licensed physicians. (P. 45, lines 8-10) In October of 1962, the Wyeth drug company sent Mr. Franklin to Nevada where he observed a mass immunization clinic. (P. 76, lines 16-25) The purpose of this trip was to train Mr. Franklin in the procedures used at the clinic and to instruct him concerning the advertising necessary for a program of

this magnitude. (P. 77, lines 1-12) The Nevada clinic utilized The Denver Book produced by the Wyeth drug company in setting up its mass immunization clinics. (P. 77, lines 20-22) The medical society in eastern Idaho became interested in the Sabin oral vaccine. (P. 87, lines 6-11) After meeting with representatives from Wyeth, Lederle and Phiser, the medical society decided to go forward with a mass immunization program utilizing the Wyeth product. (P. 87, lines 24-25) The defendants in this case have constantly tried to place the blame on the medical society for failing to warn the public of the risk involved in taking the Sabin Oral Type III Vaccine. Their defense has been that Mr. Franklin merely sold the product to the medical society and thereafter had very little to do with the program. The testimony of Mr. Franklin is to the contrary.

After the medical society selected the Wyeth company's product, Mr. Franklin was actively engaged in promoting his company's product to the public. (P. 46, lines 16-18; P. 49, lines 11-17; P. 55, lines 16-18; P. 56, lines 2-6; P. 59, lines 3-22; P. 60, lines 19-25; P. 61, line 1; P. 115, lines 3-6; P. 116, lines 15-19; P. 169, lines 1-25; P. 170, lines 20-22; P. 202, lines 8-11; P. 248, lines 20-25; P. 250, lines 1-2; P. 259, lines 18-22; P. 261, lines 13-15; P. 265, lines 1-5)

It was Mr. Franklin who came to the Idaho medical society and asked that the city of West Yellowstone, Montana, be included in the Idaho program. (P. 776, line 24 - P. 777, line 2) It was Mr. Franklin who delivered books on how to conduct a mass immunization clinic to the advertising agency and the medical society.

(P. 46, lines 14-15; P. 49, lines 15-17) It was Mr. Franklin who took care of the details of delivering the vaccine to West Yellowstone. (P. 59, lines 3-5; P. 57, lines 4-8; P. 60, lines 19-20) It was Mr. Franklin who prepared the necessary documents along with the vaccine and shipped them to West Yellowstone. (P. 80, lines 2-11; P. 116, lines 15-24) These documents included advertising posters, consent forms, tally sheets and various other paraphernalia essential to the conducting of a mass immunization program. Mr. Franklin was instructed by his company to drop everything else and to work on the mass immunization clinics. (P. 202, lines 8-11)

In March of 1963, the Plaintiff, Glynn Richard Davis, resided in West Yellowstone, Montana. The population of West Yellowstone was not over 300 people. (P. 124, line 14) The Plaintiff was a strapping six-footer engaged in the lumber business. (P. 124, lines 10-11; P. 123, line 17) He was employed as a millwright at the Elk Stud Lumber Company. (P. 123, line 17) His physical condition was excellent. (P. 122, lines 23-24) The community of West Yellowstone is relatively isolated during the winter months. (P. 125, lines 20-21; P. 124, lines 16-19) Temperatures often drop below the -40° level. (P. 126, line 19)

Davis became aware of the "K-O polio" program through the various advertising media. (P. 125, lines 8-21) He observed posters which had been placed at strategic locations around the town. (P. 126, lines 4-5; P. 126, lines 16-21) Davis felt it was his civic responsibility to take the oral vaccine in an attempt to completely

stamp out the dreaded disease of polio. (P. 146, line 23—P. 147, line 5) He took the Defendant's product on March 19, 1963. (P. 167, lines 11-12) Within three weeks he was paralyzed from the waist down and has been ever since. (P. 133, lines 11-25) Davis' condition has been diagnosed by various physicians as acute anterior poliomyelitis. (P. 194, lines 3-5; P. 316, lines 2-3; P. 442, lines 16-17; P. 514, lines 2-4)

Davis at no time was advised that there was any risk in taking the Sabin Type III Vaccine. (P. 125, lines 22-24) The posters which had been sent to West Yellowstone by the Defendant's agent did not contain any warning of the risk involved. It is interesting to note that the first knowledge that the Defendant's agent, Mr. Franklin, had of the risk involved came to him through a newspaper article. The company did not send Mr. Franklin any notice of the risk involved. (P. 62, lines 13-19)

The Wyeth drug company was notified of the risk involved in taking the Type III vaccine. Doctor Bierly testified that there is an association between the vaccine and the disease epidemiologically. (P. 606, lines 12-14) This information was communicated to the Wyeth Laboratories in September of 1962. (P. 609, lines 11-15)

The risk involved in taking the Type III vaccine is grossly misleading on a statistical basis. Evidence was introduced that the risk in taking the Type III vaccine was somewhere in the neighborhood of one in one million. Doctor Ernest Ager and Doctor Riemert Ravenholt both testified that the risk factor must be considered

in relation to the individual's age, background, sex, and socioeconomic grouping. The Surgeon General's committee found that the risk is much higher for people above thirty years of age who lived in rural areas. It also found that the risk was higher in males than in females. Doctor Ravenholt testified that there was a particularly susceptible group located in the Pacific Northwest.

It is the position of the Plaintiff that there was sufficient evidence to go to the jury on the issue of failure to warn, absolute liability, *res ipsa loquitur* negligence in manufacture, and implied warranty. This case was submitted to the jury solely on the issue of implied warranty. (P. 922, lines 2-10; P. 923, lines 3-5; Instruction No. 13, P. 938; Instruction No. 14, P. 940) The Court granted Defendant's Motion pursuant to Rule 50 of the Federal Rules of Civil Procedure as to all causes of action save and except implied warranty. (P. 903, lines 19-20; P. 922, lines 2-10; P. 923, lines 3-5)

SPECIFICATION OF ERROR NO. 1

The District Court erred in refusing to instruct the jury on the doctrine of absolute liability and in taking said cause from the jury. (P. 907, lines 14-16)

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 1

In *Greenman v. Yuba Power Products, Inc.*, 377 P. 2d 897 (Cal. 1963), the California Supreme Court enunciated a reasonable doctrine fitted to commercial practices and the realities of modern day society.

“A Manufacturer is strictly liable in tort when an article he places on market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. (citations omitted) Although in these cases strict liability has usually been based on the theory of expressed or implied warranty, running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (citations omitted), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (citations omitted) make clear that the liability is not one governed by the law of contract warranties, but by the law of strict liability of tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transaction cannot properly be invoked to govern the manufacturer’s liability to those injured by the defective products unless those rules also serve the purpose for which liability is imposed . . . The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market, rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best.”

In *Morrow v. Caloric Appliance Corp.*, 372 S.W. 2d 41 (Mo. 1963), the court stated:

“Careful consideration of the recent decisions of the courts of other states to the same effect, the inclination of the courts of this state to modify the harsh results flowing from a rule of caveat emptor in analogous fact situations, the logic of the reasoning upon which these cases (and numerous other cases therein cited) are ruled in an effort to afford justice to the vast majority of the ‘consumer’ citizenry, whose well-being, health and very lives are dependent in great degree upon processed food and manufactured articles and facilities, the fitness or safe use of which the ordinary ‘consumer’ can know little or nothing other than the fact that the processor or manufacturer holds them out to the public as fit and reasonably safe for use by the ‘consumer’ when used in the manner and for the purpose for which they are manufactured and sold, lead inevitably to the conclusion that under the facts as found by the jury the appellant is to be held liable as an implied warrantor of the fitness and reasonable safety of the gas cooking range here involved, despite lack of privity of contract.”

In *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81 (N. Y.) the court stated:

“A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises, but is a tortious wrong suable by a non-contracting party whose use of the war-

ranted article is within the reasonable contemplation of the vendor or manufacturer.

“As we all know, a number of courts outside of New York State have for the best of reasons dispensed with the privity requirements. Very recently the Supreme Court of California (*Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 67, 377 P.2d 897) (1963) in a unanimous opinion imposed ‘strict tort liability’ (surely a more accurate phrase) regardless of privity on a manufacturer in a case where a power tool threw a piece of wood at a user who was not a purchaser. The California court said that the purpose of such a holding is to see to it that the cost of injuries be borne by the manufacturer who put the product on the market, rather than by the injured person or persons who are powerless to protect themselves and that implicit in putting such articles on the market are representatives that they will safely do the job for which they were built.”

In *Santor v. A & M Karagheusian, Inc.*, 44 New Jersey 52, 207 A.2d 305 (1965), the court stated:

“In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. *The quest has found sound expression, we believe, in the doctrine of strict liability in tort* (emphasis added). Such doctrine stems from the reality of the relationship between manufacturers of products and the consuming public to whom the products

are offered for sale. As we indicated in *Henningesen*, the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely upon the skill, care and reputation of the maker. * * * It must be said, therefore, that when the manufacturer presents his goods to the public for sale he accompanies them with a representation that they are suitable and safe for the intended use. As the Supreme Court of California said, such representation must be regarded as implicit in their presence on the market. *Greenman v. Yuba Power Products, Inc.*, *supra* (377 P.2d at 901). The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves * * * .

“As we have indicated, the strict liability in tort formulation of the nature of the manufacturer’s burden to expected consumers of his product represents a sound solution to an ever-growing problem, and we accept it as applicable in this jurisdiction. And, although the doctrine has been applied principally in connection with personal injuries sustained by ex-

pected users from products which are dangerous when defective, . . . the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved (emphasis added) * * * *

“Under the strict liability in tort doctrine, as in the case of express or implied warranty of fitness or merchantability, proof of the manufacturer’s negligence in the making or handling of the article is not required. If the article is defective, i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists. Existence of the defect means violation of the representation implicit in the presence of the article in the stream of trade that is suitable for the general purposes for which it is sold and for which such goods are generally appropriate. If it is not a fact—if the article is defective and the defect is chargeable to the manufacturer, his must be the responsibility for the consequent damage or injury. The liability does not depend on traditional requirements for proof of legal or equitable fraud. Considerations of good faith or innocence of the representation or wilfulness of the misrepresentation are immaterial to existence of the cause of action.”

Oregon adopted the rule of absolute liability in *Wright’s v. Staff Jennings, Inc.*, 405 P.2d 624 (Ore.

1965). The recent case of *Wright v. Massey Harris, Inc.*, 68 Ill. App.2d 70, 215 N.E.2d 465 (1966) adopts the rule of strict liability in tort.

The Idaho Supreme Court in *Bethlahmy v. Bechtel*, 415 P.2d 698 (Idaho 1966) adopted the language of *Shipper v. Levitt and Sons, Inc.*, 44 New Jersey 70, 207 A.2d 314. At page 708:

“The law should be based on current concepts of what is right and just and the judiciary should be alert to the never ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today’s society and tend to discredit the law should be readily rejected * * *.

“The arguments advanced by Levitt in opposition to the application of warranty or strict liability principles appear to us to lack substantial merit. Thus its contention that *caveat emptor* should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregards the realities of the situation. *Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale. Levitt expresses the fear of ‘uncertainty and chaos’ if responsibility for de-

fective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result." 207 A.2d at 325-326.

SPECIFICATION OF ERROR NO. 2

The District Court erred in directing a verdict against appellants on the theory of *res ipsa loquitur*.

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 2

In one of the few cases concerning the Sabin vaccine, the doctrine of *res ipsa loquitur* was held applicable. The court stated in *Berry v. American Cyanamid Company*, 341 Fed.Rep.2d 14, Sixth Circuit, February, 1965, at page 20:

"*Res ipsa loquitur* is a rule of evidence. If applicable in this case, the plaintiff would make a *prima facie* case by introducing evidence that the taking of the vaccine caused the plaintiff to contract polio and that Lederle had exclusive control of the vaccine. The burden to proceed would then be upon Lederle to offer evidence on its behalf and in explanation of what caused the injury. However, the burden to prove negligence of Lederle by a preponderance of the evidence remains with the plaintiff.

"In dismissing count two of the complaint, the trial judge did not challenge the doctrine of *res ipsa loquitur* or its application in a products liability case

under proper circumstances. He dismissed it for the reason, as he stated, 'This Court, who has to make this determination as a matter of law, cannot say that there is any common experience or any ordinary course of events that teaches him that a person cannot contract polio from taking a polio vaccine, except for negligence of the defendant manufacturer.'

"We agree with the trial judge that the doctrine of *res ipsa loquitur* is based on a common or everyday experience. *Boykin v. Chase Bottling Works*, 32 Tenn.App. 508, 222 S.W.2d 889. The question presented by the dismissal of count two of the complaint is whether the trial judge was justified in saying there was no common experience relative to the use of polio vaccine.

It is a well known fact that during the early 1960s throughout the country and in the States of the Sixth Circuit a program was sponsored by physicians and health authorities advocating that everyone, children and adults, take Sabin oral polio vaccine. In many places mass production lines were set up by health authorities and the vaccine was administered without charge to those who availed themselves of the opportunity to take the vaccine. It was widely publicized that the disease of poliomyelitis could be virtually eliminated, if the mass of people, including children, would cooperate. It is now a known fact that the incidence of polio has been greatly reduced, if not almost entirely eliminated.

"We are of the opinion that there is a common experience relative to the use of Sabin oral vaccine,

as a result of the program of mass administration of the drug, to which reference is hereinabove made. Evidence of this experience should be available in the health department of any large city.

“We hereby remand the case to the District Court with instructions to take evidence on the experience in the use of Sabin oral vaccine and re-determine the validity of the second count of the complaint in the light of such evidence.”

SPECIFICATION OF ERROR NO. 3

The court erred in directing a verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure in favor of respondents on appellant's theory of failure to warn. (P. 923, lines 3-5)

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 3

In *Love v. Wolf*, 226 ACA 482, 38 Cal. Rptr. 183 (Cal. App. 1964) the manufacturer of cholormycetin attempted to hide behind its warning to the medical profession. The court held that the adequacy of the warning, even though it might comply with the warning required by the Food and Drug Administration, had to be considered in light of the fact that defendant's advertising *played down the danger*. Further, in this case, there was substantial evidence of over-promotion of the drug by the defendant's salesman which, if it induced the doctor to disregard warnings previously given, cancelled the warning. This statement by the court is

adequately expressed in the Journal of the American Medical Association, July 8, 1961, Vol. 177, No. 1, in an article written by Dr. Isaac Starr entitled "The Testing of New Dugs and Other Therapeutic Agents." The doctor states:

"The doctor gets aid from the better grade pharmaceutical manufacturers who often distribute, with their new drugs, package inserts and brochures, which give an excellent description of the action, usefulness and dangers of their products. But too often this descriptive material contains statements and attitudes which lead one to suspect that the firm's advertising department, rather than their medical department, had the last word."

The defendants in this action in no way advised Mr. Brower, the pharmacist in West Yellowstone, that there was any danger involved in disseminating the vaccine. It is, therefore, plaintiffs' position that this vaccine was disseminated directly from Wyeth Laboratories, through their detail man James Franklin, to a druggist in West Yellowstone, Montana, who in turn administered the vaccine to the plaintiff. A warning, if any, to the doctors in Eastern Idaho certainly cannot be considered warning to a druggist in West Yellowstone, Montana. The defendants must either breathe hot or cold. If this is a prescription drug, it was not disseminated by or through a licensed physician. If it is not a prescription drug, no warning was disseminated to the public.

In the very recent case of *Stromsodt v. Parke-Davis and Company*, (N.D. 1966), 257 F.Supp 991, the court stated at page 997:

“Although all of the Government regulations and requirements had been satisfactorily met in the production and marketing of Quadrigen, the standards promulgated were minimal. The Defendant still owes a duty to warn of dangers of which it knew or should have known in the exercise of reasonable care. *Love v. Wolf*, 226 Cal.App.2d 378, 38 Cal.Rptr. 183. See also *Ebers v. General Chemical Co.*, 310 Mich 261, 17 N.W.2d 176; *Brown v. Globe Laboratories*, 165 Neb. 138, 84 N.W.2d 151; *Gonzalez v. Virginia-Carolina Chemical Company*, 239 F. Supp. 567 (DC, SC, 1965).

“The danger must be reasonably foreseeable and the injury must be proximately caused by the failure to warn. The Defendant knew or should have known that Quadrigen might cause encephalopathies in some users and to warn of the danger.

“Though this may have been the first case in which encephalopathy occurred after the administration of Quadrigen, it does not preclude the finding of foreseeability and negligence. See *Roberts v. United States*, 316 F.2d 489 (3 Cir., 1963)

“The warning ‘Local reactions have been known to be more severe when the child is in the incubative stage of pertussis’ on the insert accompanying the product, not only would not have warned members of the medical profession, but might have misled them to believe that only in cases where the child was in the incubative stage of pertussis would encephalitic symptoms occasionally occur.

“There is no competent evidence in the entire record, medical or otherwise, to show that Shane’s condition arose out of or from any susceptibility or predisposition, nor that the child had any congenital disease or disorder or defect of any kind, nor that he had any allergy or diosyncrasy, nor that heredity was a factor that might account for his present condition.”

SPECIFICATION OF ERROR NO. 4

The District Court erred in granting a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure on appellant’s theory of negligence. (P. 923, lines 3-5)

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 4

In the case of *Stromsdot v. Parke-Davis and Company, supra*, the court stated:

“Clinical trials of Quadrigen prior to marketing were conducted by Dr. Clarence D. Barrett of Detroit beginning in 1956 and terminating in 1959. These tests used Quadrigen considered ‘fresh’ in that the product was less than six months of age from the date of ‘pooling’ of the polimy-elitis component with the DPT fraction. The trials were designed to determine antibody response and the earliest age in infancy at which immunization against poliomyelitis, diphtheria, tetanus and pertussis would be started, using a multiple anti-

gen against all four diseases. No clinical reactions of any serious consequences were reported or observed.

“Quadrigen was then made available to selected members of the medical profession who were requested to comment on their use of the product. These ‘field trials’ indicated a marked increase in reactions among patients given Quadrigen over those being given DPT and poliomyelitis vaccine. Of the severe reactions reported the first apparent instance in which death resulted was in March of 1959. It does not appear that Parke-Davis made any effort to determine the cause of the high incidence of reactions, and only a cursory attempt was made to investigate the cause of a death attributed to the use of Quadrigen.

“It appears to this Court that adequate tests performed prior to marketing would have disclosed the product’s potency instability as well as the cause of greater incidence of reaction, especially in view of the number and seriousness of the reactions being reported. This was not a situation where an epidemic existed or where need justified the risk of premature marketing since products were already available to the medical profession that satisfactorily accomplished what Quadrigen was designed to do.”

SPECIFICATION OF ERROR NO. 5

The District Court erred in giving Instruction No. 14 concerning implied warranty to the jury.

INSTRUCTION NO. 14

“In considering the question of breach of an implied warranty, you are instructed that the implied warranty involved in this case is that the vaccine was reasonably fit for the particular purpose for which it was manufactured. In other words, under such circumstances the law imposes upon defendants a warranty that the Sabin vaccine, which it manufactured and supplied, was reasonably fit and reasonably safe for consumption by members of the public as a whole. This warranty does not mean, however, that this vaccine could be used with absolute safety, but means only that the vaccine must have been reasonably fit and reasonably safe for use by the public as a whole.”

POINTS AND AUTHORITIES IN SUPPORT
OF SPECIFICATION OF ERROR NO. 5

The Court in *Gottsdanker v. Cutter Laboratories*, 6 Cal.Rptr. 320, had under consideration a verdict returned for the plaintiffs in which the jury drew a statement. In commenting on this statement, Judge Draper stated at page 322:

“In returning its verdicts for plaintiffs, however, the jury drew a thoughtful and careful statement setting forth that the jury had first considered the issue of negligence, and had ‘from a preponderance of the evidence concluded that the defendant, Cutter Laboratories, was not negligent either directly or by inference.’

“‘With regard to the law of warranty, however, we feel that we have no alternative but to conclude that Cutter Laboratories came to market * * * vaccine which when given to plaintiffs caused them to come down with poliomyelitis, thus resulting in a breach of warranty. For this alone we find in favor of plaintiffs.’ ”

At P. 326:

“Defendant strongly argues that public policy will best be served by denying recovery in warranty for ‘new’ drugs. The argument is that development of medicines will be retarded if manufacturers are held to strict liability for their defects. While this argument might have merit if the warranty involved had to do with the mere failure of a medicine to cure or of a vaccine to prevent, it seems to be of but little weight where, as here, the warranty is limited to an assurance that the product will not actively cause the very disease it was designed to prevent.”

In 1 *Frumer & Friedman Products Liability*, 382.2, Par. 16.03(4), the court stated:

“The manufacturer will be an insurer if, * * * a breach of warranty is proved, i.e., that his product was defective, or injurious, or *failed in normal use*.” (emphasis supplied)

SPECIFICATION OF ERROR NO. 6

The District Court erred in not giving Plaintiff's Requested Instruction No. 23.

“There is an implied warranty under the laws of the State of Montana that one who makes a business of selling drugs for domestic use warrants to one who buys for actual consumption that they are sound and wholesome. This warranty extends to the public generally and the liability of the seller rests upon the principle that his original act in selling impure drugs is unlawful and that he is responsible for the natural consequences of his wrongful act.

“If you find from a preponderance of the evidence that the plaintiff in this case purchased Sabin Type III vaccine from the defendants, and if you find that such vaccine was impure, then the defendants are responsible for the natural consequences of the wrongful act in selling an impure drug to the plaintiff. Under the laws of the State of Montana, even if you find that the defendants sold their product to a third party and the third party sold to the plaintiff, nevertheless, if you find that such product contained an impurity and the impurity was the proximate cause of the plaintiff’s present physical condition, then you must find against these defendants in favor of the plaintiff for damages in accordance with these instructions.”

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 6

Gottsdanker v. Cutter Laboratories,
182 Cal.App.2d 602, 6 Cal.Rptr. 320,
79 A.L.R.2d 290

Klein v. Duchess Sandwich Co.,
14 Cal.2d 272, 93 P.2d 799

Peterson v. Lamb Rubber Co.,
14 Cal.2d 339, 4 Cal.Rptr. 863,
353 P.2d 575

Vallis v. Canada Dry Ginger Ale, Inc.,
190 Cal.App.2d 35, 11 Cal.Rptr. 823

Vassallo v. Sabatte Land Co.,
212 Cal. App.2d 11, 27 Cal.Rptr. 814

Jones v. Burgermeister Brewing Corp.,
198 Cal.App.2d 198, 18 Cal.Rptr. 311

Title 27, Ch. 1, including but not
inclusively, 27-117, of the Revised
Code of Montana

Bolitho v. Safeway Stores, Inc.,
109 Mont. 213, 95 P.2d 443

Kelley v. John R. Daily Co.,
181 P. 326, 56 Mont. 63

*Seaton Ranch Co. v. Mont. Vegetable Oil
& Feed Co.*, 252 P.2d 1040
R. C. M., 1947, Sec. 74-321

SPECIFICATION OF ERROR NO. 7

The Plaintiff in this action attempted to elicit information from the Defendant concerning the profit made on the sale of the Sabin Type III vaccine. The

District Court erred in granting Defendants' Objections to Interrogatories No. 8 and 9 dated September 4, 1964.

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 7

The profit made on the sale of a product is admissible to prove over-promotion with a resulting minimization of any insert warning. *Love v. Wolf*, 226 ACA 482, 38 Cal.Rptr. 183 (Cal.App. 1964) The Court stated:

"Here it cannot be said that the wealth of Parke-Davis was relevant to any issue. Proof of its sales, however, expressed either in grams or dollars, was relevant to show a motive or reason for the alleged over-promotion of the drug, a definite issue in the case. The determination of whether such relevant evidence is, or should be, admissible is to be made by reference to rules covering the problem of restricted admissibility. We have pointed out above that no absolute special rule of exclusion applies to prohibit proof of dollar sales or profit. Being relevant and not within a rule of absolute exclusion it should be admitted—but only for a proper purpose, and under instructions of the court limiting it to that proper purpose."

SPECIFICATION OF ERROR NO. 8

The District Court erred in sustaining various objections to questions propounded by appellants' counsel during the cross-examination of defendant's agent, James N. Franklin.

POINTS AND AUTHORITIES IN SUPPORT OF SPECIFICATION OF ERROR NO. 8

This subject will be covered in the general argument by citing portions of the transcript of the record.

ARGUMENT

This Court is faced with an issue which no appellate court in the land has ever determined. Undoubtedly, counsel for appellees will argue that a warning to the medical profession concerning a prescription drug is sufficient. The uniqueness of this case lies in the fact that there was no physician-patient relationship between the Plaintiff and any doctor in the State of Idaho. The question this Court must decide is "does a warning to a physician insulate the drug manufacturers from liability when there is no contact between patient and doctor?" The answer to this question must be no.

After the introduction of the Salk vaccine, the incidence of polio rapidly declined. By 1960, polio was not considered a major health hazard in the United States. Doctor Sabin had been investigating the possibilities of a live virus vaccine during the period when polio was considered a major health hazard. For some inexplicable reason a mass immunization program for the entire country was promoted. We do not deny that the Sabin vaccine effectively immunizes one against the disease of polio. It is apparent that health authorities and drug manufacturers wanted to entirely eliminate the disease. By immunizing the vast proportion of the population with the Sabin vaccine, this goal could be

accomplished. The Salk vaccine had one drawback, i.e., it was difficult to obtain the cooperation of a great proportion of the population to have a needle injected into their arms. Tragic as it may seem, the decision was apparently made that for the good of the many, a few should suffer. The Surgeon General's advisory committee repeatedly informed the responsible health officials and the drug companies that there was a risk attendant with the use of the Sabin Type III oral vaccine. Nevertheless, community programs went forward on a mass immunization basis. It is obvious why no warning was disseminated to the general public. The mass immunization goal could not have been reached if a warning was generally disseminated among the population. The Honorable Fred M. Taylor commented on Page 569:

"I seriously doubt it, but it is not in the case, if any of the promotion that any adult was told at the time that it was given of the risk involved—I doubt if any adult was told."

At page 557, the Court stated:

"The thing that is bothering the court is who is liable for not telling the man, and giving the man the serum which apparently up to this minute has caused him to be in this terrible shape that he is in."

At page 549, the Court:

"Let me ask you this: I am not trying to harass you, but the problem bothers me. It is true, I think that the evidence conclusively shows that the man

was not advised and it was not prescribed but he took it, and it was administered by a druggist, and as a result of a campaign that was going on in Eastern Idaho and it slopped over into Montana. Did Wyeth Laboratories administer or have anything to do with the administration of the drug at that time and place that it was administered?"

The Court goes to the nub of the problem in the case. The Court, however, directed a verdict against Plaintiffs on the theory of failure to warn. (P. 923, lines 3-5) The question now becomes "was evidence introduced which could conceivably raise a jury question as concerns failure to warn?" It is appellant's position that the evidence is replete with testimony establishing the fact that the Wyeth representative, Mr. James N. Franklin, actively engaged in promoting this product to the general public. Defendant constantly contended that all Franklin did was sell the product to the medical society and then go about his business selling other Wyeth products. The following testimony is contrary to that position and creates a jury question concerning failure to warn:

Testimony of James N. Franklin:

Page 45

Line 3 "A. Originally it was. Because there is not a physician living in West Yellowstone."

Page 48

Line 14 "Q. Did your company send the books to you?"

A. Yes, sir.

Q. And the books were used as a format for conducting mass immunization clinics?

A. That is correct.

Q. And the company gave them to you for that purpose?

A. Yes, sir."

Page 49

Line 15 "Q. And you furnished that to Mr. Tyne, in Pocatello?

A. Yes."

Page 50

Line 2 "Q. With respect to the other book, have you ever seen that book before?

A. It was furnished after the program had started, Mr. Evans."

Page 56

Line 2 "Q. You also made arrangements, did you not, for the vaccine to be delivered by the Jeep Patrol of Idaho Falls?

A. You mean on the distribution?

A. Yes.

A. Yes."

Page 57

Line 4 "THE WITNESS: Did I call and contact the Jeep Patrol unit?

A. Yes.

A. Yes, I did."

Page 59

Line 3 "Q. Did you send some of the cards to West Yellowstone to be used in the campaign?

A. Yes, sir.

Line 20 Q. You had some forms printed, didn't you?

A. Yes. Mr. Tyme had me place his order with the lithographers in Pocatello."

Page 60

Line 15 "Q. Did you arrange for the immunization cards to be sent to West Yellowstone?

A. Yes.

Q. And you arranged for them to be printed by the Pocatello printing company?

A. Yes, sir.

Q. Now, did you also arrange for some posters to be printed at the Pocatello printing company?

A. Yes, I did."

Page 74

Line 24 "Q. And there I asked you this question: (reading) 'Who thought up the idea of doing the posters?' These 'K-O' posters. And the answer is: 'This was suggested in one of the books that they sent. You see, when the society started to go ahead, they send

books to the society which gives suggestions on advertising.' And the question: 'Who sent the books to them?' And the answer: 'Wyeth Laboratories'. And the question: 'I guess through you, you are the one that physically sent them aren't you?' And your answer: 'They came to me and I distributed them, yes.' Question: 'You sent one to each of the medical societies here in Eastern Idaho?' Do you recall that?

A. Yes."

Page 76

Line 16 "Q. Now, did you then have—did the company send you any place for any special training for the holding of the mass immunization clinics?

A. Yes, sir.

Q. Where?

A. Nevada.

A. I believe it was in October of 1962."

It is interesting to note here that all of the above transpired after the medical society had selected the Wyeth product.

Page 80

Line 9 "Q. You actually gave the posters to the man to take to West Yellowstone, did you not?

A. Yes, the ones that went to West Yellowstone, I did; yes."

Page 115

Line 3 "Q. No one in West Yellowstone ordered the vaccine?

A. No, sir.

Q. But you sent it up there, nonetheless?

A. Yes, sir."

Page 116

Line 15 Q. What information did you give Mr. Brower? (the pharmacist in West Yellowstone)

A. Along with the kits that went with the vaccine, an instruction sheet was incorporated telling how to set up the clinics, and how to handle the vaccine, and how to handle the disbursements."

Testimony of Robert M. Brower (pharmacist in West Yellowstone):

Page 169

Line 19 "Q. What did the conversation relate to, Mr. Brower?

A. It related to the 'K-O' polio program which was going to take place in Eastern Idaho and West Yellowstone was going to be included in that program, and Mr. Franklin, we talked about this program, and he wanted to know approximately how many doses—."

Page 170

Line 20 "Q. Who instructed you to send the money to Mr. Simpson?

A. Mr. Franklin."

Testimony of Dr. Willis Melcher:

Page 202

Line 8 "A. He (Mr. James Franklin) told me at that time that he had been instructed by Wyeth Pharmaceutical Company to drop all of his detailing and put all of the time into the management of the 'K-O' polio program."

Testimony of Delmer Edward Simpson:

Page 248

Line 20 "A. These are what we term 'out of pocket expenses' incurred by Mr. Franklin in the promotion of the 'K-O' polio, and its long distance telephone calls, and items that he had purchased, such as sugar, and dry ice, and his participation in the meetings. There is a lunch for the Medical Careers Club of Idaho Falls."

Page 249

Line 25 "A. Yes. It is an invoice from the Pizza Prince Restaurant, Idaho Falls, addressed to the 'K-O' polio, to J. N. Franklin, for 40 spaghetti dinners."

Page 259

Line 11 "A. No one had to okay it, if Mr. Franklin presented it and it appeared to be for legitimate reasons, I wrote the check out.

Q. Would Mr. Franklin have been in a position to hand you a bill and instruct you to pay it?

A. Yes, in many ways, because of the fact that he was the one that brought the invoices from the doctors, or from the managers of the clinics, he was the liaison officer in many cases that brought the invoices."

Page 259

Line 25 "A. Primarily Doctor Fife and myself could sign the checks, and if Mr. Franklin presented a bill that we had no question, he had the authority to ask us to pay it. Mr. Franklin was active in the 'K-O' polio drive, and if he authorized us to pay a bill, we would have."

Page 261

Line 10 "A. That is hard to answer because in the two or three meetings, in one case it was Doctor John Casper, and in Pocatello where I was introduced to the group in Pocatello, I was introduced as the person to take

care of the funds, I was introduced by Jim Franklin, and he was the chairman of the meeting.”

Certainly the above quoted testimony presents a jury question as to whether or not the Defendant Wyeth drug company was in any way connected with the mass immunization programs, and the jury should have been instructed on appellant’s failure to warn theory. It was prejudicial error to direct a verdict in appellee’s favor.

Doctors Ager, Ravenholt, Johnson and Melcher all testified that the Plaintiff contracted poliomyelitis as a result of taking the Sabin Type III oral vaccine. No competent evidence was introduced to indicate that Davis’s condition arose out of any hereditary, predisposition, or congenital factor. This was not an allergic reaction to any drug. This was a defective product which contained live polio virus.

As the Court said in *Gottsdanker v. Cutter Laboratories, supra*, at page 21:

“Defendant strongly argues that public policy will best be served by denying recovery in warranty for ‘new’ drugs * * * While this argument might have merit if the warranty involved had to do with the mere failure of a medicine to cure or of a vaccine to prevent, it seems to be of but little weight where, as here, the warranty is limited to an assurance that the product will not actively cause the very disease it was designed to prevent.”

Surely there is an implied warranty that Davis would not get polio from the Sabin Type III vaccine.

The Court instructed the jury in Instruction No. 13, page 939:

“If you find and believe from a preponderance of the evidence that there was such an implied warranty on the part of the defendants as to their vaccine, and you further find that the plaintiff, Glynn Davis, contracted the disease of poliomyelitis as a direct and proximate cause of the ingestion or taking of defendants’ vaccine, then defendants would have breached their implied warranty and you should find for the plaintiffs.”

Plaintiffs have no argument with this instruction. We feel it is a correct statement of law. However, Instruction No. 14, heretofore set out in full in Specification of Error No. 5, grossly misstates the law as to this particular case. Instruction No. 14 leaves one with the impression that the implied warranty means that it must be reasonably safe for the public as a whole. The implied warranty of fitness does not mean that it will be reasonably safe for the public at large when it causes the very disease it was designed to prevent. This instruction leaves one with the impression that if the statistical number of cases of polio caused by the vaccine is low enough, the vaccine is reasonably fit for the purpose for which it was intended. We feel this is not and should not be the law. If this product caused one case of polio, that individual should be compensated for a breach of the implied warranty of fitness.

The theory of absolute liability should be adopted in cases of this nature. The Plaintiff introduced evidence

that the disease was caused by the vaccine. (P. 442, lines 16-17) The reason the vaccine can cause the disease is because it retains a virulence or pathogenicity. In other words, the vaccine contains live virus capable of producing the disease. (P. 446, lines 8-9) Doctor Bierly, an agent of the Wyeth company, stated at page 611, line 4:

“Q. Is it supposed to be pathogenic—able to cause polio in an adult?

A. No.”

As the Minnesota Court stated in *Schilling v. Roux Distributing Co.*, 266 Minn.71, 59 N.W.2d. 907:

“The theory upon which the case was tried was that the defendant had warranted the dye to be safe if used in accordance with instructions and that the plaintiff having so used the particular bottle involved herein, nevertheless was injured. * * * * We are committed to the more liberal rule that proof of harmful ingredients in the particular bottle or container causing the harm is not required.”

In *Patterson v. George H. Weyer, Inc.*, 189 Kan. 501, 370 P.2d 116, 119, the Court:

“It was not incumbent upon the plaintiff to produce a chemical analysis of the product or medical testimony showing it poisonous or deleterious. When the application of it to her hair and scalp was followed by symptoms from which the simple and common sense inference would be drawn by the jury that the plaintiff suffered injury, * * * * as a

direct result of an application of the permanent wave.”

The Honorable Fred M. Taylor was convinced that the Plaintiff had to point out a defect in the vaccine or a deleterious substance in the vaccine before the theory of absolute liability would apply. At Page 907, the Court:

“I don’t recall that anybody—any witness testified that he examined any of this lot of vaccine and found a defect in it. They said, as I remember the testimony, Mr. Evans, that it was caused because of a pathogenic agent. That is the conclusion, or the opinion, and I don’t believe that it is worthy of belief. If you get to the defect of the manufacture of something, you have to show the defect in the manufactured article, and you must examine the article.”

Line 14:

“THE COURT: I don’t think there is a reason to belabor it. If it goes to the jury, it is not on that theory.”

We can only repeat again that four doctors, two of whom are nationally recognized specialists in the field of polio, and one of whom was a member of the Surgeon General’s committee, testified that the vaccine contained live polio virus which produced the disease in Mr. Glynn Richard Davis.

We respectfully submit that the jury should have been instructed on the theory of absolute liability.

CONCLUSION

This case was tried long and hard by counsel on both sides. The testimony consists of some 957 pages. The Court must instruct on counsel's theory of the case if there is any evidence to substantiate it. We sincerely believe that the Wyeth Laboratories actively promoted this drug to the public with full knowledge that there was a risk involved. That for financial gain they did not warn the public. The company was well aware that persons who lived in rural areas in the Pacific Northwest in a certain socioeconomic group with a poor history of Salk vaccine were candidates for the disease of polio if they ingested the Sabin Type III oral vaccine. Mr. Glynn Richard Davis took their vaccine with no knowledge of the risk and contracted a disease which has paralyzed him for the rest of his life.

We feel the Court committed serious error in limiting the jury to an erroneous interpretation of the law of implied warranty. We feel this case should be reversed.

Respectfully submitted,

ELAM, BURKE, JEPPESEN & EVANS

by_____

Robert J. Koontz

by_____

Blaine F. Evans

Attorneys for Appellants

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELAM, BURKE, JEPPESEN & EVANS

by.....

Robert J. Koontz

Attorney for Appellants

TABLE OF EXHIBITS

Plaintiff's Exhibits		for Identification	in Evidence
No. 26	Book		49
No. 19	Poster	61	42
No. 28	Clipping Book	81	82
No. 24	Immunization card		130
No. 23	Release form		
No. 29	Check	172	174
No. 30	Check	172	rejected
No. 31	Hospital records (Ashton)	192	195
No. 32	Simpson records	243	
No. 33	Statement (Franklin)	248	249
No. 34	Invoice	249	250
No. 35	Invoice	250	251
No. 36	Summary	252	253
No. 37	Freight Bill	253	254
No. 13	Statistical report	351	351
No. 38	Report (Memorandum)	522	524
No. 12	Idaho report	890	
No. 17	Letter—Doctor Gardner to (Doctor Mather)		901

Defendants' Exhibits	for Identification	in Evidence
No. 40 Vaccine kit		105
No. 49 AMA report	211	
No. 50 Dr. Barrows' report	225	226
No. 43 "Viral and Rickettsial Infections of Man"		
No. 51 AMA article	237	
No. 63 Surveillance report		465
No. 75 Dr. Horstmann's report	580	
No. 76 Surveillance report	591	592
No. 77 Surveillance report	591	592
No. 58 Surveillance report		590
No. 59 Surveillance report		590
No. 60 Surveillance report		590
No. 61 Surveillance report		590
No. 62 Surveillance report		590
No. 64 Surveillance report		590
No. 65 Surveillance report		590
No. 66 Surveillance report		590
No. 67 Surveillance report		590
No. 68 Surveillance report		590
No. 44 Defendant's protocol	623	
No. 78 Test results	649	650
No. 45 Shipping record		653
No. 79 Photograph	770	774
No. 52 Press release	770	771
No. 53 Report	816	
No. 54 Report	816	
No. 55 Report	816	
No. 56 Report	816	
No. 74 Surveillance report		886
No. 16 Letter		898

No. 20995

In the
United States Court of Appeals
For the Ninth Circuit

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,

Appellants,

v.

WYETH LABORATORIES, INC., a New York
corporation, and AMERICAN HOME PRO-
DUCTS CORPORATION, a Delaware corpora-
tion,

Appellees.

BRIEF OF APPELLEES

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

RICHARDS HAGA & EBERLE
711½ Bannock St.
Boise, Idaho

Attorney for Appellees

APR 11 1967

LODGED
141967
WM. B. LUCK, CLERK

WM. B. LUCK, CLERK

No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,

Appellants,

v.

WYETH LABORATORIES, INC., a New York
corporation, and AMERICAN HOME PRO-
DUCTS CORPORATION, a Delaware corpora-
tion,

Appellees.

BRIEF OF APPELLEES

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

RICHARDS, HAGA & EBERLE
711½ Bannock St.
Boise, Idaho

Attorney for Appellees

SUBJECT INDEX

Subject	Page
APPELLEE'S STATEMENT OF THE CASE	1-11
GENERAL ARGUMENT	11
CARE IN MANUFACTURING AND TESTING	11-13
THE ROLE OF THE UNITED STATES GOVERNMENT	13-15
EVALUATING THE RISK	15-22
STRICT LIABILITY	23-33
A. Court's refusal to Instruct on Strict Liability Was Not Error	23-28
B. Strict Liability Inapplicable to "Unavoidably Unsafe Products"	28-29
C. Modified Implied Warranty is Strict Liability	29-30
D. Inappropriateness of "Defective" Product Cases	31-33
DUTY TO WARN—NEGLIGENCE	33-40
INAPPLICABILITY OF RES ISPA LOQUITUR	40-45
APPELLANT'S SPECIFICATION OF ERRORS NOS. 5, 6, 7 and 8	45-48
CONCLUSION	48
CERTIFICATE OF ATTORNEY	49

INDEX OF CASES AND AUTHORITIES

Cases Cited	Page
<i>Berry v. American Cynamid Co.</i> , 341 F.2d 14 (6th Cir. 1965)	41
<i>Bethlahmy v. Bechtel</i> , 415 P.2d 698 (Idaho 1966) ..	31-32
<i>Bish v. Employers Liability Assurance Corp.</i> 263 F.2d 62 (5th Cir. La. 1956)	36-40
<i>*Bolitho v. Safeway Stores, Inc.</i> , 95 P.2d 443	46
<i>Bonowski v. Revlon</i> , 100 N.W. 2d 5 (Iowa, 1959) ..	39
<i>Foster v. Ford Motor Co.</i> , 139 Wash. 341 246 Pac. 945, 48 ALR 934	37
<i>Goldberg v. Kollsman Instrument Corp.</i> 191 NE 2d 81 (N.Y.)	31
<i>*Gottsdanker v. Cutter Laboratories</i> , 6 Cal Rep. 320 ...	45
<i>Green v. Clark Equipment Co.</i> , 327 F. Supp. 427 at 429 (D.C. Ind. 1965)	30
<i>Greenman v. Yuba Power Products, Inc.</i> , 377 P.2d 897 (Cal. 1963)	30-31
<i>Henderson v. National Drug Co.</i> , 343 Pa. 601, 23 A.2d 743 (1942)	43
<i>Holmes v. Ashford</i> , 2 All E.R. 76 (CA) (1950) ..	37
<i>Hurley v. Beech Aircraft Corp.</i> , 355 F.2d 517 (7th Cir. 1966)	23-24-26
<i>Kaenpefe v. Lehn & Fink Product Corp.</i> , 249 N.Y.S.2d 840 (App. Div. 1964) ..	40
<i>Katz v. Arundel-Brooks Concrete Corp.</i> 220 Md 200, 151 A.2d 731 (1959)	36
<i>Love v. Wolf</i> , 38 Cal 183, 192 (Cal. 1964) ..	34-46-47-48
<i>Lewis v. Baker</i> , 413 P.2d 400 (Ore., 1966) ..	25-26
<i>Marrow v. Caloric Appliance Corp.</i> 372 S.W. 2d 41 (Mo. 1963)	31
<i>McGee v. Wyeth Laboratories</i> , 29 Cal App. 2d 322 (1963)	36
<i>Merrill v. Beauty Views Corp.</i> 235 F.2d 893 (10th Cir. 1956)	36
<i>Pontife v. Sears Roebuck & Co.</i> , 226 F.2d 909 (4th Cir., Va., 1955)	36
<i>Santor v. A & M Karagheusian, Inc.</i> , 44 N. J. 52, 207 A.2d 305	27-31

<i>Stottlemire v. Cawood</i> , 213 F. Supp. 897 (D. C. Cir. 1963)	34
<i>Travis v. Rochester Bridge Co.</i> , 18 Ind. 79 122 N.E. 1 (1919)	37
<i>Tuscany v. U.S. Standard Product Co.</i> , 243 S.W. 2d 207 (Tex. Civ. App. 1951)	44
<i>United States v. Moser</i> , 266 U.S. 236, 242, 43 S.Ct. 66, 67, 69 L.Ed. 262 (1924)	26
<i>Webb v. Sandoz Chemical Works</i> , 85 Ga. App. 405, 69 S.E. 2d 689 (1952)	43
<i>Wright v. Massey Harris, Inc.</i> , 61 Ill. App. 2d 70, 215 N.W. 2d 465 (1966)	31

LEGAL TEXT

Restatement (Second) Torts, §402A (1965)	23-28-30
2 Frumer and Friedman, <i>Products Liability</i> , §16A (4) (e), p 3-203	27
3 Frumer and Friedman, <i>Products Liability</i> , §33.02 (2) (d), p 252	33
(1966 Cumulative Supp.)	
76 ALR 2d, p. 16	35
76 ALR 2d, p. 21	35
76 ALR 2d, p. 25	37
76 ALR 2d, p. 66	38

No. 20995

In the

United States Court of Appeals For the Ninth Circuit

GLYNN RICHARD DAVIS and

FLORENCE DAVIS, husband and wife,

Appellants,

v.

WYETH LABORATORIES, INC., a New York corporation, and AMERICAN HOME PRODUCTS CORPORATION, a Delaware corporation,

Appellees.

BRIEF OF APPELLEES

APPELLEE'S STATEMENT OF THE CASE

Paralytic poliomyelitis is a disease which is caused by what is frequently referred to as virulent polio virus. There are three types of polio virus, namely: Type I, Type II and Type III. There are many individual strains within each of these types of poliomyelitis. The stronger strains are frequently referred to as virulent, and the weaker strains are often called attenuated. A virulent strain is one which has a disease producing capacity. (Tr. 446, lines 16-19) An attenu-

ated strain is a strain of virus which has been manipulated to eliminate disease producing ability. (Tr. 805, lines 2-13) Sabin vaccine was manufactured by appellee with Dr. Albert Sabin's attenuated virus strains. There was no evidence introduced in the case by either party that tended to indicate the existence of virulent virus in the vaccine.

Clinically speaking, human beings acquire polio through the mouth. The virus is usually placed directly in the mouth by the person acquiring the virus. The alimentary tract is that part of the body behind the teeth and ending with the gut. It is commonly believed that the virus multiplies from a few particles to many millions in the throat and gut. When it reaches the gut, it causes an "infection." (Tr. 868, lines 21-25; 869, lines 1-6) The infection is not the disease. One can be infected with polio virus but not become ill or diseased as a result of the infection. (Tr. 602, lines 9-25; 603, lines 1-19) In other words, the infection is not necessarily the disease. One can be infected with polio virus but not become ill with clinical symptoms or disease as the result of the infection.

When the disease results, and this does not happen in all people, clinical symptoms of the disease are manifested. These clinical symptoms usually start with influenza-like ailments, such as headache, stiff neck, fever, diarrhea and the like, and may progress all the way to partial or complete paralysis. (Tr. 866, lines 7-21)

Among knowledgeable members of the medical profession and research scientists, it is not known how the virus is transported from the stomach to the point

where it attacks the motor centers of the body, but it is believed that it is through the blood stream. (Tr. 869, lines 18-25) In any event, the virus is produced in such quantity that it does ultimately get to the spinal column. In the spinal column, the individual virus particles attack the anterior horn cells. The anterior horn cells are the "grey matter" in the spinal column. Destruction of a sufficient number of these cells results in paralysis. (Tr. 603, lines 19-25; 604, lines 1-5)

The polio vaccine involved in this particular case is Sabin oral polio vaccine. The name is derived from Dr. Albert Sabin, who, after many years of research, developed the vaccines. There are three separate types of vaccine, that is to say, Type I, Type II and Type III, each of which is designed to immunize the people who receive it from contracting paralytic poliomyelitis from a corresponding type of polio virus which may be at large in nature. (Exhibit No. 40)

The use of live virus in vaccination for poliomyelitis had been under consideration throughout the world for a number of years, and in the United States it was determined that the Sabin vaccine strains were the ones that should be used. (Tr. 672, lines 9-15) Licensing was handled by the Division of Biologic Standards of the National Institutes of Health, which is a part of the United States Department of Health, Education and Welfare. (Tr. 671, lines 6-14) Ultimately, the United States licensed three manufacturers of the vaccine. Wyeth Laboratories is one of the licensed manufacturers. Wyeth was licensed to sell Type III vaccine on May 17, 1962. (Tr. 676, lines 18-23) Of course, licensing in the United States was preceded by testing in literally millions of people throughout the world. (Tr. 809, lines 19-25; 810, lines 1-15) In the United

States, clinical testing before licensing was performed on between 700,000 and 1,000,000 people. (Tr. 585, line 25; 586, lines 1-5) The Sabin oral vaccine is licensed for sale only as a prescription drug.

The vaccine is usually manufactured in what the production people call "lots." Each lot of the vaccine is manufactured under the standards devised by the Division of Biologic Standards, which are extremely complex and technical. These particular standards are in evidence as defendant's Exhibit 57. (Tr. 673, lines 2-6) The virus used in the vaccines, without regard to who manufactures it, all comes from a common source. When Wyeth Laboratories determined that it would attempt to manufacture the vaccine, they obtained from Dr. Sabin a so-called "seed" virus, and this original seed is still maintained and is still the parent of each lot of separate vaccine manufactured by the Wyeth Laboratories. (Tr. 621, lines 5-10) The virus is grown in minced monkey kidney tissue, which has been placed in a nutrient media. (Tr. 620, lines 6-12) After the individual crop of virus has been completely grown, it is harvested and then used in the preparation of the vaccine.

The individual lot is run through a number of tests in the manufacturing laboratory, including a neurovirulence test in monkeys. All of these tests are extremely difficult and quite sophisticated. The tests are generally summarized on page 621 through line 7 of page 626. These tests, in addition to acting as a standard against which the safety of the vaccine can be measured when used by humans, also are for the purpose of establishing an identity of the vaccine virus to the original seed virus obtained by Sabin. This is done through the neurovirulence test in monkeys. In

that test, the vaccine, in various dilutions, is injected directly into the brains of monkeys in the thalamus and intra-spinally in the lumbar enlargement of the spinal cord, which is the most sensitive part of the cord. The monkeys are observed for a number of days and from observations and later dissection of the sacrificed animals, testing scientists are able to determine whether or not the vaccine has met the standards prescribed by the United States Government. This test is described on page 627, at line 3 through page 628, line 16.

Following manufacture and satisfactory testing within the laboratories, the vaccine involved in this case was then sent to the Division of Biologic Standards of the United States where it was again subjected to rigorous testing, including a neurovirulence test in monkeys. (Tr. 648, lines 17-25; 649, lines 1-25; 723, lines 2-25; 724, lines 1-21) If the United States Government is satisfied with the results of the test, individual authorization for the release of the lot is granted to the manufacturing laboratory. All of these things were, of course, done in connection with the vaccine which appellant claims he consumed, which was part of Wyeth's Lot 35. The vaccine in Lot 35 was released by the Government for sale on January 31, 1963. (Tr. 694, lines 7-12) At the time of its release, it conformed to the standards established by the Government. (Tr. 650, lines 1-8, Exhibit 78)

The vaccine involved in this particular case was packaged in small bottles, each of which held 100 doses of the vaccine. (Tr. 654, lines 1-7) This particular vaccine was sold by Mr. James Franklin, a salesman for Wyeth Laboratories, to the Southeastern Idaho Medical Association at Idaho Falls, Idaho, and was in-

voiced to the association by the appellees. (Tr. 111, lines 12-16, Exhibit 32) Each vial of the vaccine sold contained a package insert explaining the nature and characteristics of the vaccine, giving directions for its use and setting forth all of the conditions and circumstances that had been reported about the vaccine to the time of the sale which might have an adverse effect on the desired and anticipated result from the use of the vaccine. (Exhibit 40) The medical society in east Idaho was the entity which determined that it would be wise to use this vaccine in West Yellowstone, Montana, since West Yellowstone has no doctors or advanced medical facilities and most of the people in that territory are patients of doctors in Southeast Idaho. (Tr. 108, lines 13-25; 110, lines 1-11) As a result, some of the vaccine was shipped to Mr. Robert Brower, a druggist at West Yellowstone, Montana. (Tr. 171, lines 15-24) The package insert explaining the drug was in the vaccine sent to Mr. Brower. Mr. Brower used the vaccine and appellant alleges that he consumed some of it, for which he paid the sum of 25 cents, which Mr. Brower took from him. Mr. Brower later forwarded the fund that he had collected to Mr. Del Simpson, an accountant for the medical society at Idaho Falls, Idaho. (Tr. 170, lines 14-15) On about April 14, 1963, appellant began to manifest symptoms of illness and was hospitalized at Ashton Memorial Hospital in Ashton, Idaho. He was then transferred to the L.D.S. Hospital at Idaho Falls, Idaho, and later to the Elk's Rehabilitation Home in Boise, Idaho. Thereafter, he went to the Veterans Administration Hospital at Boise, Idaho. (Exhibits 31, 2, 3 and 4)

The use of Sabin oral vaccine in the State of Idaho was not a decision that was reached by the appellees.

On March 31, 1962, Dr. Terrell O. Carver, Administrator of the Idaho Department of Health, and Dr. Robert E. Staley, then president of the Idaho State Medical Association, issued a press release which went to public health personnel, physicians and members of the press. In that release, they noted that a meeting had been held with officers of the State Medical Association and several component medical societies in the State of Idaho, together with representatives of the Department of Health, and the United States Public Health Service. Through the press release, all of these people had recommended that mass immunization clinics for the vaccination of the populace be held. (Tr. 757, lines 3-25; 759, line 1, Exhibit No. 46)

One of the people attending this meeting was Dr. John Mather, Director of the Division of Preventive Medicine for the State of Idaho. (Tr. 873, lines 15-17) This doctor identified the recommendation of the United States Public Health Service, Exhibit 56, and recommended the use of the mass immunization clinics, even though he recognized a possible attendant risk. (Tr. 897, lines 16-25; 898, lines 1-2) Another man attending the March, 1962, meeting was Dr. John Casper, who served as county physician in Bonneville County, Idaho, and as State Health Officer for the same area. (Tr. 756, lines 2-4) Dr. Casper concurred in the recommendation for the use of Sabin vaccine and in the joint press release from the State of Idaho, the Medical Society and the United States Public Health Service. (Tr. 758, lines 18-24, Exhibit 46)

Dr. Casper, not the appellees, was the man who introduced the idea of establishing mass immunization clinics in Eastern Idaho. He presented the concept to

the president of the Idaho Falls Medical Society and to the Public Health Committee of the Society, then to the membership of the Society. (Tr. 759, lines 9-24) The Public Health Committee of the Society consisted of Dr. Casper and five other physicians. (Tr. 760, lines 3-8) This committee was charged with the responsibility of selecting which manufacturer should provide the vaccine. There were three manufacturing laboratories, Lederle, Pfizer and the appellee, Wyeth Laboratories. (Tr. 761, lines 3-9) Of course, all of the drugs are essentially the same; they are Sabin oral vaccine, and Dr. Casper pointed out that the only real difference was in the method of administration. (Tr. 762, lines 16-25; 763, lines 1-2) Based on the method of administration, the committee selected the Wyeth product. (Tr. 763, lines 3-6)

These mass immunization clinics were originally scheduled in the fall of 1962. (Tr. 764, lines 4-6) It was also decided by the Public Health Committee that they would coordinate the mass immunization clinics throughout Eastern Idaho, including the upper Snake River Valley, the Idaho Falls area, and Pocatello, Idaho. (Tr. 768, lines 1-6) In order to coordinate these various groups, a meeting was held at Blackfoot, Idaho, attended by the principal doctors involved and the head of an advertising agency, Jim Tyme. (Tr. 765, lines 7-23)

The decision to use the vaccine in West Yellowstone, Montana was made by Dr. A. A. Krueger, a practicing physician in Ashton, Idaho. He requested that the vaccine be sent to West Yellowstone, Montana. His request was directed to James Franklin, Wyeth's salesman. (Tr. 106, lines 8-25; 108, lines 13-18; 110, lines

2-11) Dr. Krueger asked the pharmacist in West Yellowstone, Montana, Mr. Robert Brower, to administer the vaccine, because he "was the only one remotely related to the medical profession in the area." The reason for sending the vaccine from Idaho into West Yellowstone, Montana, was based on the fact that there are no doctors in West Yellowstone, and patients there used Ashton, Idaho, medical facilities. (Tr. 106, lines 15-24; 777, line 14)

Meanwhile, the Surgeon General of the United States of America had created a Special Advisory Committee on the use of oral polio vaccines. In September of 1962, the Surgeon General's committee had made a press release, together with an official release to medical people advising them that there might be a risk in the taking of the Sabin oral vaccine. This release is in evidence as Exhibit 9. The appellee's salesman, James Franklin, read about that release in a Pocatello newspaper. (Tr. 94, lines 18-23) The newspaper release was the first information obtained by anyone in the Wyeth organization. He notified the Medical Society at Idaho Falls about the release, through Dr. John Casper. (Tr. 95, lines 1-9) Following that notification, a meeting of the Public Health Committee was called by Dr. Casper to discuss the Surgeon General's report. (Tr. 771, lines 23-25) As a result of that meeting, Dr. Casper and several other of the doctors placed a telephone call to Dr. Luther Terry, the Surgeon General, in Washington, D. C., and talked to one of his assistants. (Tr. 772, lines 11-21) Following the telephone call, they continued the planning for the program, but delayed their clinics. (Tr. 772, lines 24-25; 773, lines 1-2) The delay in the program and the reason for it was released by Dr. Casper and the committee in a

newspaper article which is in evidence as Exhibit 79. (Tr. 773, lines 12-24)

Another report of the Surgeon General's committee was issued on December 18, 1962. This is in evidence as Exhibit No. 10. Dr. John Casper was familiar with the report and had seen it prior to the clinics. (Tr. 774, lines 15-25) Knowing the risk, the committee of the Medical Society decided to go ahead with the program in the spring of 1963. (Tr. 775, lines 2-8) The dates for the clinics were established by the Public Health Committee. (Tr. 778, lines 16-18)

Most of the mechanics of local immunization and the operation of the clinics was set up under the direction and control of Dr. John Casper in his capacity of Public Health Service Doctor. His office stored the vaccine, and he was present when it was unloaded and repackaged for shipment to other points. (Tr. 779, lines 1-18) Advertising was handled by the society and their paid advertising representative, James Tyme. (Tr. 764, lines 21-25; through 765, line 6) The organization had the clinics set up in various schools and public buildings. (Tr. 764, lines 7-11) The advertising was placed in the form of flyers and distributed in grocery stores and similar public establishments.

The monies received from the clinics were turned over to Mr. Del Simpson, an accountant in Idaho Falls, Idaho. (Tr. 225, lines 24-25) Mr. Simpson had been requested by Dr. Casper, acting for a group of doctors, to act as accountant for the clinics. (Tr. 256, lines 16-25) The funds were deposited in the Bank of Commerce, Idaho Falls, Idaho, as a special account and withdrawals required the signature of Del Simpson

and Dr. Reid Fife. (Tr. 257, lines 13-21) From these funds, the medical society's bill for the vaccine, Exhibit 32, was paid in full. At the conclusion of all fund payments, the balance of the account was turned over to the various medical societies in Idaho. (Tr. 263, lines 8-10)

The entire program had a marked degree of success, since approximately 90% of the population was vaccinated. (Tr. 780, lines 23-25; 781, lines 1-3)

GENERAL ARGUMENT

Due to the complexity of this case, appellees' argument has been divided in two sections. This section generally argues and highlights factual matters, while legal theories are stated in a separate section of the argument.

Care in Manufacturing and Testing

One of the most interesting aspects of appellant's brief is the assumption that Wyeth's Sabin oral vaccine was a defective product. Appellant has not cited wherein the product was defective, nor pointed out those portions of the transcript which establish a defect in the product; yet the cases cited by appellant all involve products which were determined to be defective.

The trial of this cause required some two weeks, and a great many of the witnesses were called for the purpose of showing the extreme care used in manufacturing the product and thereafter testing it before it was placed on the market.

Dr. Alan Bernstein described this entire manufacturing process from the time monkeys were selected and observed before kidney material was used in the process to the point where the vaccine was ultimately tested, cartoned and stored for use.

Dr. John H. Brown was the director of appellees' Marietta, Pennsylvania, facility where the manufacturing was handled. He carefully described the extremely complex method used in testing the vaccine by the appellees before a portion of the material was submitted to the United States Government for further testing. These tests are all summarized in a document which the experts call "protocols." These protocols are in evidence as Exhibit 44.

Thereafter, the material was sent to the Division of Biologic Standards of the National Institutes of Health, which is a part of the United States Department of Health, Education and Welfare. Dr. Roderick Murray, the director of that division, testified and described the manner in which the product was originally licensed for sale in the United States, before individual laboratories started producing vaccine. Thereafter, he described the method used to test the product within the Division of Biologic Standards. His testimony further showed that this specific lot of vaccine was released by the Department before sale to the public.

Dr. Ruth Kirschstein, an assistant to Dr. Roderick Murray, testified concerning detail of some of the tests she ran on this particular Lot 35 manufactured by Wyeth Laboratories. This included the extremely complex neurovirulence test in monkeys, which cannot

be easily described. Those test results are summarized and appear in Exhibit No. 78.

In addition to all of the physical testing on the material itself, field testing had also taken place. Millions of people were served with Sabin vaccine throughout the world prior to the time it was used in the United States. Wyeth Laboratories, through the director of its clinical testing facilities, Dr. M. Z. Bierly, again field tested the vaccine before use within the United States.

At no point during the course of the trial was it ever suggested that the appellees were negligent in manufacturing the vaccine, testing it, or handling it in storage. Under such circumstances, it is difficult to perceive how the appellants can claim that the vaccine was defective in any respect whatever.

The Role of the United States Government

One of the unusual aspects of this case is the tremendous role the United States Government played in the manufacturing of Sabin oral polio vaccines. The Surgeon General of the United States of America had established an Advisory Committee on oral polio vaccines. Within this Advisory Committee there existed a Technical Committee which assisted the Division of Biologic Standards in establishing standards of testing vaccine material before it was to be released to the population as a whole. Dr. Roderick Murray, previously mentioned herein, was the director of that division and a member of the Surgeon General's committee. He identified the standards used by the division which are in evidence as Exhibit No. 57. Through many pages of testimony, Dr. Murray explained the methods of setting the standards, the method of exam-

ining protocols and retesting vaccine within his division. The result of the division's work with regard to Lot 35 is best summarized on page 696 of the transcript, lines 1 through 5:

“Q. With respect to the release then of this particular lot, a determination was made by the division that this lot met the standards of the division for purity, potency and safety?”

“A. That is correct, yes.”

In addition to actual physical testing of the product, the division maintains a degree of surveillance over advertising. All labels and package inserts are submitted to the Division of Biologic Standards before they are used by a particular company. (Tr. 707, lines 5-22) Another member of the Technical Committee established by the Surgeon General was Dr. David Bodian. He serves as Director of the Department of Anatomy at Johns Hopkins University, School of Medicine, and is considered one of the world's leading authorities on the pathogenesis of poliomyelitis. The greater portion of his life has been devoted to research in the poliomyelitis field. (Tr. 867 lines 7-10) He pointed out in his testimony that the Technical Committee was the one that developed the standards under which the vaccine was produced and tested. (Tr. 837, lines 2-10) The larger part of the Surgeon General's committee, of which Bodian was also a member, was called together to review the results of the first use of licensed oral poliomyelitis vaccine in the field. (Tr. 837, lines 13-15)

The review of the use of the vaccine in the field was handled primarily under the auspices of the Epidemiology Branch of the Communicable Disease Center,

United States Public Health Service. This branch is headed by Dr. Alexander D. Langmuir, who also testified. The CDC authors the Polio Surveillance Unit Reports, a number of which are in evidence as exhibits in this case. (Exhibits 10, 58, 59, 61, 63, 62, 65, 64, 68, and 74, 76 and 77 are examples) It was this larger committee which statistically evaluated the risk involved in the administration of the oral polio vaccines. Several other members of the committee testified at the trial. These included Dr. John P. Fox and Dr. Ernest A. Ager.

The role of the United States in the manufacturing, testing, distribution and use of the drug was manifest throughout the trial. The United States originally licensed the drug for production, and then released each production lot after testing. Government agencies examined the labels and package circulars, as well as the boxes containing the drug. A Government committee established the standards for manufacturing and testing. The Public Health Service urged the mass immunization clinics, which is evident from Exhibits 46 and 56. Following the administration of the vaccine, the United States then monitored the results through the Communicable Disease Center to determine if there was a relationship between the vaccine and subsequent polio cases. This was done, of course, on a statistical basis.

Evaluating the Risk

Appellant complains that no one advised him as to the risk involved in taking Type III Sabin oral polio vaccine. He insists that the appellees had a duty to warn him of this risk, and failed to do so.

Initially, it was not known that there was any risk in the taking of Type III vaccine. The risk was first evaluated in the Surgeon General's Report of September 22, 1962, which contains a number of press releases and is in evidence as Exhibit 9. The risk was re-evaluated in a December 18, 1962, report of the Surgeon General's committee, in evidence as Exhibit 10. Final evaluation of the risk was made in the 1964 Surgeon General's report, in evidence as Exhibit 11. Table 9 therein establishes the risk at .40 cases per million population. In the age group above 40, the risk is at .42 cases per million of population. Dr. David Bodian describes the risk as "minimal" for Type III vaccine.

"Q. I believe that in the article which you have written in the book that you described earlier (referring to the witness's article in *Viral and Rickettsial Infections of Man*, chapter 18) you stated that the risk is minimal for Type III, as well as Type I and Type II?

"A. That is correct. May I just add that this is with reference to the type of risk encountered with other immunizing agents. When you say minimal, you have to have something in mind and we there refer to the history and knowledge of the kind of risk that people have to undergo, have to expect and be led to expect when they develop medical procedures.

"Q. So, in terms of the other procedures such as smallpox vaccination, surgical procedures or any of the things that people do for a medical or health reason—this risk would be mini-

mal. Actually, when you mention it, the risk from the taking of the live polio vaccine is minimal when compared, for example to the taking of smallpox vaccine; is it not?

“A. Yes.”

(Tr. 859, lines 5-24)

Furthermore, the risk in the vaccine has never been established with any particular case, and the Surgeon General's committee carefully pointed out that there is no laboratory test which provides a definitive answer that can establish that an individual case was or was not caused by the vaccine.

“It should be emphasized that the committee does not consider that an individual case can be proved to be caused by the vaccine and no laboratory test has thus far provided a definite answer.”

(Page 4, Exhibit 10)

The report further indicated that no specific lots of vaccine or vaccines of a particular manufacturer could be associated with cases.

“That there was no apparent association of cases with specific lots of vaccine and vaccines produced by a particular manufacturer.”

(Page 4, Exhibit 10)

Of course, the association of poliomyelitis in a particular individual with the vaccine is strictly an epidemiological conclusion. The science of epidemiology

Dr. John Casper testified that the Public Health Committee of the Idaho Falls Medical Society carefully considered the risk, and was aware of it.

“We had to make that decision as a member of the Public Health Committee; would it be better to drop the whole program and perhaps take the risk of an epidemic of polio in the community, and particularly of the Type III in that Type III was being a more significant source of polio in that the Salk vaccine was . . . seemed to be more effective for type I and Type II, but did not produce an immunity to Type III. And that seemed to be more of a problem, and that was the decision we had to make . . . Was it better to drop the program and have a risk that the community is going to be subjected to a polio epidemic. We had not had any polio for quite some time, and it is a common belief that polio epidemics occur in a cyclical effect, every seven years. You have a problem every few years, and we had not had any polio for quite some time, and the decision was made that the benefit far outweighed the disadvantages of the quoted statistics of one in a million.”

(Tr. 787, lines 3-20)

The risk was also the subject of much medical literature. It was discussed in the Journal of the American Medical Association for October 15, 1962, in evidence as Exhibit 49, summarized briefly on page 32 of the Journal of the American Medical Association for January 12, 1963, in evidence as Exhibit 51, and again discussed in the JAMA on January 26, 1963, in evidence as Exhibit No. 42. The problem was also discussed in the local newspapers and appeared in the Idaho Falls Post Register in an article in evidence as

Exhibit No. 52. Termination of the Idaho Falls clinics scheduled for the fall of 1962 was discussed in a newspaper article on September 18, 1962, in evidence as Exhibit No. 79.

Finally, Dr. M. Z. Bierly prepared the package insert contained in every carton of vaccine, and that package insert carried the summation of the risk attendant in the vaccine. The full text of the package insert with regard to the warning appears on page 597, line 8, through page 599, line 6, of the transcript.

Of course, the Public Health Committee of the Idaho Falls Medical Society had real reason to consider the risk, since appellee's salesman, James Franklin, specifically advised them that a risk might be involved in the feeding of the vaccine. Dr. Casper acknowledged receipt of a copy of the Surgeon General's report in 1962. (Tr. 768, lines 23-24; 769, lines 1-14) He also recalled placing a telephone call to an Assistant Surgeon General of the United States with his committee listening in on the call. (Tr. 776, lines 8-21) This meeting resulted from the fact that James Franklin had read an article in the newspaper about the risk while he was in Pocatello, Idaho, and so advised the committee. (Tr. 94, lines 18-25; 95, lines 1-15)

It is difficult to perceive how deep appellant wished to have the warning run, since the entire medical profession seemed to be aware of the risk. This is, after all, a prescription drug and certainly the duty to warn was fully met when all of the physicians were advised of the medical literature available on attendant risk, if any there was.

Finally, in evaluating the risk it is almost impossible to determine when a medical risk becomes un-

reasonable. There is certainly some problem in the use of any medical procedure, including the use of vaccines for other medicines. Dr. Bodian recognized this as noted above. Appellant's witness, Dr. Riemert Ravenholt, recognized it:

"Q. Is there a medical risk involved in the use of smallpox vaccine?

"A. There is some risk, yes.

"Q. That would approximate in the one in a million people will probably die?

"A. This is under more careful measurement at the present time, but this is not too far from the mean.

"Q. And two hundred eighty-five in a million will be seriously ill?

"A. That is the definition of seriously ill.

(Tr. 490, lines 11-21)

Dr. Fox looked at the medical risk in this fashion:

"A. Very much so. There are very few completely safe therapeutic or preventative agents, and I actually cannot off hand think of another vaccine, except Type II or Type I, or all polio, that has a smaller risk associated with its use, especially toward someone with its consequences."

Appellant charges that the risk in taking Type III vaccine is grossly misleading. Appellant's brief, page 7. Appellant's witness, Dr. Reimert Ravenholt, is cited as the authority establishing the true risk. It is evident from his testimony that Type III poliomyelitis was on the rise in the United States. During the course of

cross-examination, Dr. Ravenholt was handed Exhibit No. 63, later offered and accepted into evidence, and from that exhibit he testified as follows:

"Q. Doctor, you have before you what is in evidence as defendant's Exhibit No. 63. Will you examine page 5 of the table? Isn't it true that in 1961, that 44% of all isolations of polio virus from patients afflicted with poliomyelitis were of Type III?

"A. This is true for the cases reported here. I do not know how many were paralytic.

"Q. It does not show how many were paralytic; for the northwestern states, this would show in Idaho 3 of 6 isolations in the state were Type III?

"A. Correct.

"Q. And in Oregon, 3 of 5 isolations were Type III?

"A. Correct.

"Q. And in Washington, 10 of 12 isolations were Type III?

"A. Correct."

Furthermore, it was more than evident from Dr. Ravenholt's testimony on cross-examination that the attack rate of poliomyelitis was 4/10th of a case per million for the population given the vaccine. (Tr. 488, lines 11-15) Plaintiff's Exhibit No. 11, and specifically Table 9 thereof, establishes that in persons taking the vaccine in the age group of 40 or over, the attack rate was .42% per million, or 2/100ths of a per cent higher than the population as a whole. Dr. Ravenholt acknowledged this fact. (Tr. 489, lines 1-8).

STRICT LIABILITY

A. COURT'S REFUSAL TO INSTRUCT ON
STRICT LIABILITY WAS NOT ERROR

Appellant's first specification of error is without merit. Appellant urges that the court erred in refusing to instruct the jury on the doctrine of strict liability (or, as appellant terms it, "absolute" liability), and in taking the cause from the jury. In passing on the question of implied warranty, the jury has necessarily decided the question of strict liability against appellant. This is for the reason that the doctrine of strict liability does not truly impose "absolute" liability, and is applicable only when the product is "... in a defective condition unreasonably dangerous to the user or consumer. . . ." Restatement (Second) Torts § 402A (1965)) The jury was instructed on implied warranty to the effect that the product must have been "reasonably fit and reasonably safe for consumption." (Instruction No. 14, Tr. 940) The jury determined the product *was* reasonably fit and reasonably safe for consumption. This is tantamount to a finding that the product was not "defective." Therefore, a basic fact necessary for the imposition of liability upon the appellee—a defective product—under either a negligence theory, a breach of warranty theory, or a strict liability theory, has already been determined by the jury against appellant, and the parties hereto are bound by such determination.

In *Hurley v. Beech Aircraft Corp.*, 355 F.2d 517 (7th Cir., 1966) the plaintiff-appellant complained of the dismissal by the trial court of a breach-of-warranty

count. However, by its findings of fact holding against plaintiff after trial of a negligence count, it was held that the trial court had necessarily found that the assembled product was free of the one defect about which complaint was made. The effect of such finding was that there could not have been a breach of warranty. Accordingly, the appellate court held the dismissal by the trial court of the breach-of-warranty count was not reversible error, stating in part as follows:

“Plaintiffs do not dispute the law of collateral estoppel by judgment; but they do try to escape its effect by arguing that the only findings essential in the negligence case would have been findings to the effect that the defendant assembled, inspected and tested the plane as a prudent manufacturer would have done under the circumstances and exercised ordinary care in the process. This argument ignores the fact that to find no defect in the aircraft is to find no basis for the charge of negligence in the manufacture of the aircraft and is thus merely a negative way of stating that the manufacturer was not negligent.

“(2) In light of the foregoing, we conclude that the question of fact, whether the aircraft was defective, was common to both counts of the complaint. Without such defect, there could have been no negligence as charged in count II and no breach of implied warranty as charged in count I. The determination of that fact was critical to the trial court’s determination of count II and was not beyond the issues. Under the doctrine of collateral estoppel by judgment, plaintiffs are now barred from proceeding under count I. . . .”

Another case to the same effect is *Lewis v. Baker*, 413 P.2d 400, a 1966 Oregon case. This case involved the drug, MER/29, wherein the complaint alleged both negligence and breach of warranty. At the trial of the cause, the jury heard plaintiff's evidence on the issue of negligence. An issue was made whether or not the manufacturer had disclosed fully to the Food and Drug Administration of the United States Government all known and relevant information concerning the safety of the drug. The case was submitted to the jury on the theory of negligence, the trial judge withdrawing from the jury's consideration the issue of implied warranty. On appeal, the withdrawal of the implied warranty theory from the jury was urged as error. The court held that the jury's finding was tantamount to a finding that the product was reasonably safe. The court stated:

“(3-6) From the evidence in the record, the jury could have found either way upon the question whether the manufacturer had disclosed fully to the Food and Drug Administration all known and relevant information concerning the safety of the drug. The verdict for the defendant was, in effect, a finding that there was no willful or negligent mislabeling. We hold that upon such facts a drug, properly tested, labeled with appropriate warnings, approved by the Food and Drug Administration, and marketed properly under federal regulation, is, as a matter of law, a reasonably safe product. Accordingly, a person claiming to have suffered adverse effects from using such a drug, unless he can prove an impurity or an inadequacy in labeling, may not recover against the seller for breach of warranty.

“(7) From what has been said about the immunity of a prescription-drug manufacturer from warranty liability when federal agency approval has been properly obtained and the drug is marketed with all required safeguards, it follows that upon proof of fraud or culpable non-disclosure in the obtaining or retention of such federal approval there should be no such immunity.

“While outright fraud was not alleged in the case below, and is disclaimed in the plaintiff’s reply brief, the jury did hear the plaintiff’s evidence on an issue of negligence in failing to give adequate warnings concerning possible harmful side effects of the drug. In a somewhat analogous situation, where the trier of fact found that a product alleged to have been negligently assembled was free of the one defect complained of, there could not have been a breach of warranty. Accordingly, the withdrawal by the trial court of the breach-of-warranty issue was held not a reversible error. *Hurley v. Beech Aircraft Corporation*, 355 F.2d 517 (7th Cir. 1966).

“(8) Thus, in the case at bar, where the jury necessarily found, in effect, that there was no culpable nondisclosure in the labeling of the drug, even though the jury passed upon that question under a negligence instruction rather than under a warranty instruction, there would appear to be no reversible error in the withdrawal of the warranty issue. No useful purpose could be served by sending the case back for another trial on the issue of culpable non-disclosure. To the extent that the issue was tendered by the pleadings, it was submitted and settled during the trial below. See *United States v. Moser*, 266 U. S. 236, 242, 43 S. Ct. 66, 67, 69 L.Ed. 262 (1924).

either doctrine, is that the product in question must be one that is not reasonably fit for the ordinary purposes for which such articles are sold and used. The jury in this case found that the product *was* reasonably fit for ordinary purposes for which it was sold and used. Therefore, appellant's argument that the doctrine of strict liability should have been presented to the jury by an instruction is moot, because the jury has already found against him on this point and he is bound thereby.

B. STRICT LIABILITY INAPPLICABLE TO "UNAVOIDABLY UNSAFE PRODUCTS"

Even if the effect of the jury's finding is ignored, there is cogent reason for the court's not giving a separate instruction on strict liability. The vaccine in question, even if it were held to involve some risk in the absolute sense, would still fall within the Restatement definition of an "unavoidably unsafe product." In Restatement, (Second) Torts §, 402A (1965), paragraph k, unavoidably unsafe products are defined as follows:

"k. *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a pro-

duct, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk."

Thus, even under the Restatement of Torts rule, which can hardly be said to be in favor of or promulgated by manufacturers of products, respondent would have no strict liability.

C. MODIFIED IMPLIED WARRANTY IS STRICT LIABILITY

Additional justification — if any is needed — for the trial court's action is that in instructing on implied warranty (shorn of its ordinary common law and sales act qualifications) the trial court did, in effect, impose strict liability. The strict liability aimed at by the Restatement of Torts is hardly more than the classic

doctrine of implied warranty stripped of its traditional qualifications.

As stated in *Green v. Clark Equipment Co.*, 327 F. Supp. 427. at 429, (D. C. Ind. 1965) :

“Without attempting an exhaustive explanation, it may fairly be said that the liability which this section (Restatement (Second) Torts, § 402A) would impose is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties.”

Appellant could hardly have hoped for a more liberal instruction by the trial court in this case. Appellant, in effect, did receive an instruction on strict liability. The case cited by Appellant in support of its specification of error No. 1, *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), also recognizes this. All the court decided in that case was that courts should simply recognize that strict liability for defective products is being imposed and should straightway declare that they are imposing strict liability in lieu of engaging in the vain circumlocution involved in protesting that recovery is based on implied warranty without its ordinary contract qualifications. *Greenman* is merely a plea for forthrightness; it effects no novel substantive change. The quotation adopted by appellant in his brief shows this when the court is quoted as saying: “. . . Although in these cases strict liability has usually been based on the theory of warranty . . .” Appellant in this case received the advantages of strict liability. His only complaint is that the court labeled it implied warranty rather than strict liability.

D. INAPPROPRIATENESS OF "DEFECTIVE" PRODUCT CASES

Finally, the cases relied upon by appellant are inappropriate factually. The jury has already determined that a "defective" product was not involved. Appellant's cited cases all deal with "defective" products. Appellant's *Greenman v. Yuba Power Products* case requires a "defect" before the doctrine comes into play. Appellant's *Marrow v. Caloric Appliance Corp.* holds the defendant as a warrantor of the fitness and reasonable safety of a gas cooking range. This case merely abolishes the traditional requirement of privity of contract, and actually requires less than the trial court has already granted appellant in the instant case. Appellant's *Goldberg* case is also a case which does nothing more than abandon the privity requirement. Appellant's *Santor* case, as pointed out in the excerpt from 2 Frumer and Friedman, *Products Liability*, hereinbefore quoted, specifically limited its holding to "defective" products.

The case of *Wright v. Massey Harris, Inc.*, also cited by appellant, is yet another case involving a product specifically determined to have been "defective."

The Idaho Supreme Court, in the *Bethlahmy* case, cited and quoted at page 14 of appellant's brief, quite explicitly pointed out in its opinion that a defective product (a residence) was involved. In its opinion, which imposed an implied warranty of fitness upon sellers of new houses, the court stated (415 P.2d, at 702) :

" . . . Plaintiffs commenced this action for rescission and restitution, mainly on the ground of defendants'

failure to disclose the *defective* condition of the house. The presence of the unsealed irrigation ditch through the lot and beneath the garage, coupled with the fact that the basement was not of waterproof construction, constituted major *defects*, known to defendants, and unknown to plaintiffs, and not discoverable upon reasonable inspection. Failure to disclose such *defects* would support a finding of fraud. *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960) . . ." (emphasis added)

In further discussing the requirement that such homes need be only "reasonably" fit, the court stated (*Op. Cit. supra* at 711) :

" . . . The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution. The builder-vendor's legitimate interests are protected by the rule which casts the burden upon the purchaser to establish the facts which give rise to the implied warranty of fitness, and its breach. See *Schipper v. Levitt & Sons, Inc.*, *supra* . . ."

Thus, appellant has failed to cite this court any authority which should govern or be persuasive in the case at bar, since the product in question herein was properly determined by the jury to have no defect.

In fact, there is respectable authority to the effect that appellant in this case was not even entitled to an

instruction on implied warranty. In 3 Frumer and Friedman, *Products Liability*, §33.02 (2) (d) the following appears:

“Recent authority, however, indicates that there is no breach of warranty if an unadulterated drug, properly tested, labeled with appropriate warnings, and approved by the Food and Drug Administration, causes an adverse reaction. It has also been held that such a drug is not unreasonably dangerous within the rule of strict liability in tort.” (Citing *Cornish v. Sterling Drug, Inc.*, No. 14,713-3 (WD Mo. May 13, 1965) (CCH *Products Liability Reports*, Sec. 5415); *Cochran v. Brooke*, 490 P.2d 904 (Ore. 1966); *Lewis v. Baker*, 413 P.2d 400 (Ore. 1966); *Cudmore v. Richardson-Merrell, Inc.*, 398 S. W.2d 640 (Tex. Civ. App. 1965)

Factually, there is no question but that the drug in the present case was properly tested, labeled and approved by the Government.

Therefore, it appears that appellant, not satisfied with having received a warranty instruction which was not justified by the record in this case, is now attempting to convince this court that the jury could or would have found a legally cognizable defect in the product if it had been presented with that same question under the different label of “strict liability.”

DUTY TO WARN—NEGLIGENCE

Appellant urges as error, in separate specifications numbered 3 and 4 in his brief, the failure of the court to instruct on negligence and the failure to instruct on duty to warn. In the factual situation involved in this case, the specifications are one and the same. For, if

there is any negligence, it must be in that the respondent failed to warn. The evidence is without conflict that the drug was pure and uncontaminated, and the jury so found. When the drug left the lab it is clear that there was no negligence, in that the product was pure and uncontaminated. Any negligence must have arisen after the drug left the lab. The only possible act for which the manufacturer might be held accountable would be in its failure to warn. Therefore, the negligence—duty to warn argument is one and the same. That this is so is evidenced by the following quote:

“Since the record shows without conflict that the drug was pure and uncontaminated in manufacture, negligence, if any, would have to be predicated upon evidence that the company failed adequately to warn of the dangers of its use.”

Love v. Wolf, 38 Cal. 183, 192 (Cal. 1964)

The warning required is only to the doctors or the medical profession, and not the ultimate consumer. *Love v. Wolf*, *supra*; *Stottlemire v. Cawood*, 213 F. Supp. 897 (D. C. Cir. 1963). There can be no factual contention that such warning was not given to the doctors involved. Mr. Franklin went well out of his way and far exceeded the task enjoined upon a reasonable man to warn. Immediately upon learning of the possible consequences from use of the drug, Mr. Franklin called a meeting of the Southeastern Idaho Medical Association, Public Health Committee, and told them of the Surgeon General's finding. Not content to rest there, Mr. Franklin caused a telephone call to be placed to Luther Terry, Surgeon General of the United States, to request advice. The doctors so advised were thus in possession of the same knowledge which Wyeth Lab-

oratories had. Certainly a defendant manufacturer cannot be expected to reveal something which neither he, nor anyone else, knows. The trial court made no error in taking this issue from the jury. Indeed, in the context of the record before this court, if the trial court had instructed on negligence based on a failure to warn and the verdict was against the manufacturer, the manufacturer would have more than ample cause to vigorously complain in this appellate court. This duty to warn was carried out so thoroughly, efficiently and convincingly that no two reasonable persons would disagree that the duty in this regard was discharged.

This duty to warn giving rise to negligence is not an absolute duty. As stated by the author of the annotation in 76 ALR 2d, page 16:

“ . . . The rule as to when a manufacturer or seller must warn (or, stated differently, when he will be held negligent if he fails to warn) is this: A manufacturer or seller of a product which, to his actual or constructive knowledge, involves danger to users has a duty to give warning of such danger. . . . ”

The author cites almost three pages of authority to substantiate this proposition. As stated, the manufacturer must have actual or constructive knowledge of the danger. When appellee manufacturer in this case obtained this actual knowledge he did in fact warn those whom it was his duty to warn. This duty to warn only arose when appellee acquired knowledge of the dangerous condition. There was no duty to warn prior to the Surgeon General's report because the product was not in fact dangerous. As stated in 76 ALR 2d at page 21:

“Since a manufacturer or seller is obliged to warn of product connected dangers of which he has actual or constructive knowledge, it follows as a matter of elementary logic that no duty to warn arises with respect to a product which is not in fact dangerous.”

It can be argued with respectable authority that when the Surgeon General's report brought to light that there was less than one in a million chance of anyone contacting poliomyelitis from the drug in question, that no duty to warn thereby arose. In other words, where there is only a remote possibility of danger from the use of the product in question there is no duty to warn at all. *Bish v. Employers Liability Assurance Corp.*, 236 F.2d 62 (5th Cir. Ct. App. La. 1956); *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959); *Pontife v. Sears Roebuck & Co.*, 226 F.2d 909 (4th Cir. Ct. App. Va., 1955); *Merrill v. Beauty Views Corp.*, 235 F.2d 893 (10th Cir. 1956); *McGee v. Wyeth Laboratories*, 29 Cal. App. 2d 322 (1963).

Appellant states on page 27 of his brief that this is a novel case and that no court in the land has passed on the issue of duty to warn in the situation where a prescription drug is sold but there is “no patient-physician relationship.” This, of course, assumes that at least the legal equivalent of such relationship was not present in this case to such an extent as to sufficiently establish effectiveness of the warning to the only group of persons who could properly evaluate any risk involved, which appellee submits is not true. In any event, it is the position of appellee that even if the well-established rules concerning prescription drugs are completely ignored, the principle that a warning to the im-

mediate purchaser is sufficient. As stated in 76 ALR 2d, at page 25:

“Assuming that there may be recovery, regardless of lack of privity of contract, on the basis of a manufacturer’s negligence in failing to warn his immediate vendee, there can be no recovery on such basis by one other than the immediate vendee where adequate warning was given the immediate vendee.”

Illustrative of this principle is the case of *Travis v. Rochester Bridge Co.*, 18 Ind. 79, 122 N.E. 1 (1919), when the court held that a manufacturer of an article who sells it knowing of a defect has a duty to give notice to the purchaser and is liable to the purchaser or any other person injured as a consequence of the defect. However, if he notifies the purchaser, his liability is at an end, and any liability for injury to third persons rests upon the purchaser.

The principle is again illustrated in *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 Pac. 945, 48 ALR 934 (1926). This action involved a plaintiff-employee’s suing the manufacturer of a tractor when the tractor tipped over on the employee while he was trying to extricate it after it became stuck in the mud. The court reversed the judgment in the plaintiff’s favor on the basis that the manufacturer couldn’t be held liable on failure to give notice because he gave notice to the employee’s employer. An English court, in *Holmes v. Ashford*, 2 All E.R. 76 (CA) (1950), held the manufacturer of “Inecto” hair dye was not liable to a woman injured when the dye was applied to her hair by a beauty parlor operator whom the manufacturer had warned.

It would therefore seem that just as the interposition of a physician in the sale of a prescription drug between the manufacturer and the user is in effect held to be a supervening cause, the same principle is applicable where adequate warning has been given to a non-physician vendee who may be reasonably expected to recognize any risk involved by reason of the warning given. And even if this court were to hold that a legally sufficient equivalent of the technical physician-patient relationship was not present herein, it is submitted that the vendees of this vaccine, the Eastern Idaho Medical Society, were in fact the proper parties to receive and adequately evaluate the warning given by appellee, since general information and warning of any risk involved had been effectively disseminated to the general public prior to the time appellant claims to have contracted this disease.

Still another reason that the trial court herein properly did not give an instruction on the duty to warn is the fact that there was no proof that any claimed failure to warn caused the appellant to take the vaccine in question.

The necessity for proof of such a causal relationship is stated by the author of the above mentioned annotation, 76 ALR 2d at page 66, as follows:

“Assuming that in a negligence action against the manufacturer or seller of a product alleged to have caused injury, it is shown that the defendant failed to comply with his duty to give adequate warning regarding the product, it does not necessarily follow that the defendant is liable for the injury. One of the hurdles (present in all negligence litigation) standing between proof of a negligent failure to

warn and ultimate recovery is the necessity of proof of a proximity causal relationship between the negligence and the injury."

It is the position of appellee that it cannot be stated, based upon the record before this court, that "but for the absence of an effective warning" appellant would not have taken the vaccine. In fact, common sense and knowledge of the mainsprings of human conduct would unavoidably bring one to the opposite conclusion. Simply stated, that proposition is this: a man has less than a one in a million chance of contracting the dreaded disease of polio if he takes the vaccine. If he does not take the vaccine, his chances of contracting polio are abundantly increased. There is no evidence whatsoever in this case that even if plaintiff-appellant had been given a specific and detailed warning he would have refused to take the vaccine. Common sense indicates prudence would move a reasonable man to take such a minimal risk as is involved herein.

Still another of the great variety of possible justifications which the trial court had for denying the request to instruct on failure to warn as negligence is that the respondent in the instant case is, at best, in an analogous situation to those with allergies or peculiar susceptibility to a particular product. Witness the case of *Bonowski v. Revlon*, 100 N.W. 2d 5 (Iowa, 1959), a case involving sun tan lotion. The court at page 89 stated:

"The testimony is that one person (plaintiff) in five million was allergic to the combination of the sun tan and sun shine. . . . Neither the seller nor the manufacturer is liable for breach of warranty or for

negligence where an isolated buyer is allergic or unusually susceptible to the product.”

The case of *Bish v. Employers Liability Assurance Corp.*, 236 F.2d 62 (5th Cir. La., 1956), is also illustrative. This case involved a home permanent containing ammonium thioglycolite. The court in that case stated at page 62:

“In the absence of either a danger or knowledge of a danger of the use of a product, or where there might be only a *remote possibility* of danger, failure to warn is not negligence. Nor is a warning required as to product where an injury results from the sensitivity of allergy of a person in the use of a product which would be innocuous to normal people.” (Emphasis added)

In *Kaenpefe v. Lehn & Fink Product Corp.*, 249 N.Y.S. 2d 840, (App. Div. 1964), the court held that there is no duty to warn “the unknown few who constitute a mere microscopic fraction of potential users who may suffer allergic reaction not common to the ordinary or normal person.” To hold the manufacturer responsible for warning a minuscule segment of the population would be in no wise agreeable to common sense or justice.

INAPPLICABILITY OF RES IPSA LOQUITUR

Appellant urges the applicability of the doctrine of *res ipsa loquitur* in his Specification No. 2 with an apparent disregard of what is pertinent. There is an affirmative and unqualified showing of the absence of negligence in the record before this court. If, as in this case, the appellant's own proof shows that there was

no negligence and that all proper means were taken to insure the purity of the drug, there certainly is no need or justification for the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is an evidentiary doctrine that upon proof of a certain set of circumstances a jury is permitted to infer negligence in the absence of some rebuttal. The rebuttal in this case was furnished by appellant's own evidence, as well as appellee's evidence. The evidence in this case so completely refutes any negligence on the part of appellee that claims to the contrary are in utter defiance of the evidence of record.

Appellant cites *Berry v. American Cynamid Co.*, 341 F.2d 14 (6th Cir. 1965). The appellate court remanded the matter to the district court with instructions to take evidence on the experience in the use of Sabin oral vaccine and to redetermine the validity of the second count of the complaint in the light of such evidence. However, in the instant case, evidence *was* taken on the experience in the use of Sabin oral vaccine. This evidence showed that only four in ten million users of the Sabin oral vaccine contracted poliomyelitis. Such a microscopic statistical number by itself destroys the doctrine of *res ipsa loquitur*. If 9,999,996 out of ten million users fail to contract polio this is certainly evidence of a complete and utter absence of negligence. Certainly one could infer any number of things other than negligence in the face of such staggering statistics. One could infer that the particular person who was the one in two and one-half million had a special susceptibility which was unknown to medical science. One could infer that the drug was not even the cause of the disease. One could infer that poliomyelitis was previously contracted. One could infer that the drug itself was totally ineffective and did

not act to cause (or to prevent) poliomyelitis in the four in ten million. The list of other permissible inferences from the mere circumstances adduced by appellant in this case is practically inexhaustible.

The jury has already determined that the vaccine was reasonably fit and reasonably safe for the purpose for which it was intended. Therefore, at the time the vaccine was distributed the presence of any possible previous negligence had been negated by such determination. It was incumbent upon the appellant to prove that some act subsequent to manufacture was negligent. We have already seen that the only possible act upon which appellant could ground negligence was in the failure to warn. There, however, was no duty to warn for a great variety of reasons. (This is in addition to the uncontroverted evidence that there was in fact warning by appellee.) This precludes any claim of negligence. Appellant is attempting to till arid and infertile soil in urging the applicability of an evidence doctrine which is irrelevant under the facts of this case. It is also interesting to note that in relying on the doctrine of *res ipsa loquitur* to set up a permissible inference of negligence, the appellant is not capable of pointing out any tangible object in the exclusive control of appellee. There was no negligence in the preparation of the product (the jury found the product reasonably fit and reasonably safe). Therefore, an act of negligence must have come *after* the manufacture. After the manufacture and sale of the drug, appellee had no exclusive control of it. Up to and after the manufacture, there was no negligence according to the jury's finding. One cannot infer that the failure to warn caused the poliomyelitis. A "defective"

drug must have caused it. But, as we have seen, there was no "defective" drug.

Additionally, there are any number of drug cases holding the doctrine of *res ipsa loquitur* inapplicable. One of these cases is *Webb v. Sandoz Chemical Works*, 85 Ga. App. 405, 69 S.E.2d 689 (1952). This action was against a manufacturing chemist, the producer of a drug known as "Cafergone", for injuries sustained as a consequence of taking the drug. It appeared that the drug was prescribed by plaintiff's physician for alleviation of plaintiff's migraine headaches; that plaintiff took the drug in accordance with the physician's directions; that the physician's directions complied with directions which defendant gave for the taking of the drug; and that as a result of the use of the drug the plaintiff suffered a permanent impairment of vision. Upholding a nonsuit, the court said that the *res ipsa loquitur* doctrine was inapplicable and the evidence demanded a finding that no negligence on defendant's part was shown. It was pointed out by the court that there was proof that it was good medical practice to prescribe "Cafergone", notwithstanding the fact that sometimes bad results might follow where persons had individual sensitivity to drugs not discoverable in the exercise of ordinary care. In *Henderson v. National Drug Co.*, 343 Pa. 601, 23 A.2d 743 (1942), the court held, without even bothering to discuss the point, that *res ipsa loquitur* was not applicable to the facts presented. The facts were that the action was brought against a drug manufacturer for an abscess which developed on plaintiff's back where the doctor injected him with a liver extract manufactured by the defendant. The doctor testified that the abscess was due to an irritant in the liver extract, and that other patients

injected with the same product also developed abscesses. The court, in reversing, held the evidence insufficient to establish that the presence of irritants in the injection given plaintiff was due to the negligence of defendant. The inference that defendant failed to use due care in the preparation of the liver extract was said not to be so compelling as to exclude the equally reasonable inference that the plaintiff's physician did not use due care in its administration. In that case there were, in fact, similar abscesses which developed in other people. Yet, the court held that there was no negligence. Now, of course, for appellant in the present case to prevail, the doctrine of *res ipsa loquitur* which he advances must be advanced against negligence in preparation of the Sabin vaccine. This has been decided against appellant, because the jury determined that the product when it came out of the laboratory was a perfectly good product. Another case holding the *res ipsa loquitur* rule inapplicable was *Tuscany v. U. S. Standard Product Co.*, 243 S.W.2d 207 (Tex. Civ. App. 1951). This was a case wherein the plaintiff sought damages for injury to his wife who injected herself with a drug known as estrogenic hormones. The act of negligence pointed to by the plaintiff on the part of the defendant manufacturer was negligence in the preparation of the product. The court affirmed the judgment in defendant's favor, pointing out that plaintiff could offer no evidence of any positive act of negligence on defendant's part, and that although the accident and injury to the plaintiff's wife were proved, as were surrounding circumstances from which it might have been reasonably inferred that the injury was a result of some negligence (either on the part of the defendant or on the part of the plaintiff's wife), this was not enough under the *res ipsa loquitur*

rule to impose liability on one party any more than on the other, simply because some accident and injury occurred.

Thus, it can be seen that appellant cannot produce sufficient evidence enabling him to rely on the doctrine of *res ipsa loquitur*. Appellant must recognize that the jury properly determined that the product was not "defective" and therefore there could have been no negligence prior to the time the product left the exclusive control of appellee. Certainly, the only other act of negligence which would be cognizable by this court would be the failure to warn, and such failure to warn can only be proven by specific evidence, since the product was not, at the time of any such alleged failure, within the control of appellee.

APPELLANT'S SPECIFICATION OF ERRORS NOS. 5, 6, 7 and 8

Appellant's specification of error No. 5 is to the effect that the trial court erred in giving an implied warranty instruction. It is difficult to perceive the thrust of his argument, since the only case cited and quoted in support thereof is the *Gottsdanker* case, which primarily abolished the doctrine of privity in imposing liability upon a manufacturer of Salk vaccine for a defective product, even though the product was "new".

Appellant then quotes from Frumer and Friedman, *Products Liability*, to the effect that the manufacturer will be an insurer if a breach of warranty is proved. As appellee has previously pointed out in this brief, no such breach can be present if there is no "defect" in the product, and Instruction No. 14, complained of in this specification, properly presented the question of breach of warranty to the jury, which decided this issue against appellant.

Appellant's assignment of error No. 6 is still another attempt to impeach the jury's verdict that there was no breach of implied warranty. Requested Instruction No. 23, which the trial court did not give, is simply a restatement of the implied warranty duty, specifically abolishing the privity requirement and substituting the term "impure" for "defect" or "not reasonably fit" and "not reasonably safe."

That appellant's argument in the specification is nothing more than the warranty argument all over again is illustrated by *Bolitho v. Safeway Stores, Inc.*, a case cited by appellant (95 P.2d 443), wherein the court cites the Montana statute (their Section 7618, Revised Code) to the effect that one who sells provisions for domestic use warrants the soundness and wholesomeness thereof and then goes on to state, at page 444:

"... This statute simply enacts into statutory form what many courts hold the rule to be in the absence of statute.... (citing cases)"

Appellant's specification of error No. 7 is without merit, because there was no evidence of "overpromotion" in the instant case. Even so, the only relevance of the evidence sought would be in connection with failure to warn. It has been seen that there *was* in fact warning, notwithstanding the fact there was not even any duty to warn. The *Love v. Wolf* case was cited by appellants to show profits of a manufacturer are relevant evidence to show *motive* for overpromotion. As stated by the court at page 189:

"... Proof of its sales, however, expressed either in grams or dollars, was relevant to show a motive or reason for the alleged overpromotion of the drug, a definite issue in the case...."

In the first place there was no evidence of overpromotion, as pointed out above, but equally important is the question why evidence of overpromotion itself is relevant in a case of this type. It can have no bearing on implied warranty or strict liability, for, if these doctrines are applicable, the *product* itself—without regard to extrinsic evidence—creates or negates liability. In other words, if these doctrines are applicable, then no amount of evidence of under-promotion would save the manufacturer from liability for a defective product, nor would overpromotion have any bearing thereon.

The only relevance of overpromotion is in regard to duty to warn. It is relevant to show motive for failing to warn. It is relevant to show that, if a warning were given, it was cancelled by overpromotion.

In *Love v. Wolf*, the manufacturer claimed its duty to warn was discharged as a matter of law. The court summarizes the plaintiff's counter argument thus:

"... She also contends that even conceding a proper warning had been given Dr. Wolf and the rest of the medical profession, such warnings must be deemed cancelled out if overpromotion through a vigorous sales program persuaded doctors to disregard the warnings given...." (p. 289)

Plaintiff in the *Love* case went on to argue that a jury question was presented as to whether overpromotion cancelled out the warning given. Since proof of profits, as stated in the *Love* case, is only relevant to show a motive or reason for alleged overpromotion, it is obvious that evidence of overpromotion is a pre-

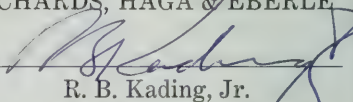
requisite to proof of any motivation to overpromote. Appellant could not and did not present adequate evidence of any overpromotion by appellee, and therefore evidence of a claimed motive for such overpromotion was irrelevant in this matter.

CONCLUSION

This case was tried before a court and jury with masses of highly technical and complex evidence presented to them. The natural sympathies for the appellant cannot override the fact that the Sabine vaccine has succeeded in effectively reducing paralytic poliomyelitis in the United States from 57,000 in 1959 (Tr. 480, line 21) to not more than 46 cases for 1965 through October. That millions of people have been insulated from this dread disease as a result of the progress of medical science is vivid testimony to the correctness of the court, in ruling upon the law, and the jury in deciding upon the sufficiency of evidence to support its verdict.

Respectfully submitted,
RICHARDS, HAGA & EBERLE

By


R. B. Kading, Jr.


W. C. Roden

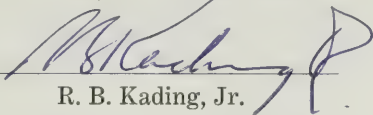
Members of the Firm
Attorneys for Appellees
711½ Bannock Street
Boise, Idaho

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARDS, HAGA & EBERLE

By

A handwritten signature in blue ink, appearing to read 'R. B. Kading, Jr.', written over a horizontal line.

R. B. Kading, Jr.

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 1967, I personally served three copies of Appellee's brief in this matter on a member of the firm of Elam, Burke, Jeppesen & Evans, at Boise, Idaho.

RICHARDS, HAGA & EBERLE

By William C. Roden
A Member of the Firm
Attorneys for Appellees
711 1/2 Bannock Street
Boise, Idaho

No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York
corporation, and AMERICAN HOME
PRODUCTS CORPORATION, a Delaware
corporation,
Appellees.

APPELLANT'S REPLY BRIEF

*On Appeal from the District Court of the
United States for the District of Idaho,
Southern Division*

FILED

ELAM, BURKE, JEPPESEN & EVANS
1010 Bank of Idaho Building
Boise, Idaho 83701
Attorneys for Appellants

APR 26 1967

WM. B. LUCK, CLERK

MAY 1 1967

No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York
corporation, and AMERICAN HOME
PRODUCTS CORPORATION, a Delaware
corporation,
Appellees.

APPELLANT'S REPLY BRIEF

*On Appeal from the District Court of the
United States for the District of Idaho,
Southern Division*

ELAM, BURKE, JEPPESEN & EVANS
1010 Bank of Idaho Building
Boise, Idaho 83701
Attorneys for Appellants

INDEX OF CASES AND AUTHORITIES

Cases Cited	Page
<i>Brown v. Globe Laboratories</i> 84 N.W. 2d 151 (Nebraska)	4
<i>Cochrane v. Brooke,</i> 409 P. 2d 904 (Ore. 1966)	8
<i>Cudmore v. Richardson-Merrell, Inc.</i> 398 S.W. 2d 640 (Texas 1966)	2, 8
<i>Gottsdanker v. Cutter Laboratories,</i> 6 Cal. Rep. 320, 79 A.L.R. 2d 290 (Cal. 1960) . . .	4, 6, 8, 9
<i>Greenman v. Yuba Pines Products, Inc.,</i> 377 P. 2d 897 (Cal. 1963)	3
<i>Green v. American Tobacco Company,</i> 325 F. 2d 673 (1963)	Appendix D
<i>Lewis v. Baker,</i> 413 P. 2d 400 (Ore. 1966)	8
<i>Rogers v. Toni Home Permanent,</i> 147 N.E. 2d 612 (Ohio 1958)	2
<i>Sterling Drug, Inc. v. Cornish,</i> 370 F. 2d 82 (C.C.A. 8th 1967)	2,7
<i>Stromsodt v. Parke-Davis and Company,</i> 257 F. Supp. 991 (N.D. 1966)	4

LAW REVIEWS

65 Yale Law Journal 262	19
-------------------------------	----

TEXT

<i>Carter, Breakthrough</i> (1966), Library of Congress Catalog Number: 65-26621	9
---	---

No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS and
FLORENCE DAVIS, husband and wife,
Appellants,

v.

WYETH LABORATORIES, INC., a New York
corporation, and AMERICAN HOME
PRODUCTS CORPORATION, a Delaware
corporation,
Appellees.

APPELLANT'S REPLY BRIEF

Our reply brief is divided into two parts. In the first part we answer Appellees' response to all of our causes of action except failure to warn. In the other section we discuss their response to our arguments on failure to warn.

I.

**ALL CAUSES OF ACTION EXCEPT
FAILURE TO WARN**

With respect to the various drug products manufactured in this country relating to the human body, there is an

easy classification of uses. The cases cited by Wyeth relate to pharmaceutical uses not involved in this case. The categories are:

I. PRODUCTS THAT ARE USED FOR COSMETIC PURPOSES.

This gives rise to a type of case in which the hair falls out, fingernails are disfigured, and so on in the use of cosmetic products. *Rogers vv. Toni Home Permanent*, 147 N. E. 2d 612 (Ohio 1958). Nonprescriptive, over-the-counter products are involved that harm hypersensitive or idiosyncratic plaintiffs. Some courts have granted relief; some have not. As pointed out in *Sterling Drug v. Cornish*, 370 F.2d 82 (C.C.A. 8th 1967) the denial of relief seems to be based on the unforeseeability of the injuries and the futility of a warning, or the lack of an allergic class.

II. PRODUCTS CONSUMED TO IMPROVE THE HEALTH OF AN INDIVIDUAL.

These cases involve drugs such as MER-29, taken to reduce the cholesterol in the bloodstream, but additionally cause cataracts in the eyes. *Cudmore v. Richardson-Merrill, Inc.*, 398 S.W.2d 640 (Texas 1966). Or Aralen, a drug effective in the treatment of arthritis but that can additionally destroy the retina of the eye. Given on prescription, the drugs are to correct a patient's difficulty and involve a medical decision as to whether the cure is worth the risk.

III. PRODUCTS CONSUMED TO PREVENT DIS-

EASE IN AN INDIVIDUAL BUT NOT IN OTHERS.

IV. PRODUCTS CONSUMED TO SUPPRESS DISEASE IN AN INDIVIDUAL AND IN OTHERS.

This is the category in which Sabin polio vaccine falls. It has several factors not found in other cases. These are: communicable disease, mass clinic in which a prescription drug was given to a healthy individual without a prescription, the public was induced to take a vaccine to eliminate a disease.

Wyeth having deprived us of our strict liability theory below, now seeks to have it reinstated on appeal on the theory that an instruction on warranty of merchantability is an instruction on strict liability in tort. Instruction No. 14, requested by Wyeth, says that the warranty involved in this case "is that the Sabin vaccine was reasonably fit and reasonably safe for consumption by members of the public as a whole."

Strict liability in the classic definition is:

"A manufacturer is strictly liable in tort when *an article* he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that *causes injury to a human being*." *Greenman v. Yuba Pines Products, Inc.*, 377 P.2d 897 (Cal. 1963). ^{Emphasis supplied}

Warranty of merchantability relates to the public as a whole. Strict liability relates to the individual.

Wyeth argues that the fact their products gave the plain-

tiff polio does not demonstrate a defect. The defect was amply explained by doctors Ager and Ravenholt. (Appendix A) Logic dictates that a vaccine which produces the very disease it is designed to prevent is by definition defective. Additionally, plaintiff's experts testified that Type III Sabin vaccine is pathogenic and this was the cause of the disease. This is sufficient. *Gottsdanker v. Cutter Laboratories*, 6 Cal. Rep. 320, 79 A.L.R. 2d 290 (Cal. 1960); *Stromsodt v. Parke-Davis and Company*, 257 F. Supp 991 (N. D. 1966); *Brown v. Globe Laboratories*, 84 N. W. 2d 151 (Neb.).

The theory as to why it causes the disease is that of the so-called "hot particle". (See Appendix B)

Further comment on the Wyeth strict liability argument requires a look at the instructions. Only three related to liability. Instructions No. 13, 14 and 15 are set out in full in appendix. (See Appendix C)

Instruction No. 14, as given by the court, was an instruction that was requested by the defendant. Apparently, Wyeth is interested in establishing in this case that it is a complete defense in the sale of its polio vaccine if it meets the warranty of merchantability, that is, if it is reasonably safe for consumption "by members of the public as a whole". (Instruction No. 14) At best, the instruction is very confusing. In Instruction No. 13, the court discusses implied warranty, and in it the court says that if Glynn Davis contracted polio as a result of taking the defendants' vaccine, then defendant has breached its implied warranty. Then, in Instruction No. 14, the court turns around and says in considering the question of breach of

implied warranty, the vaccine is reasonably fit for the particular purpose for which it was manufactured if it is reasonably safe for consumption by members of the public as a whole. Instruction No. 14, following Instruction No. 13, would obviously be read by the jury as a modification or limitation of the scope of the implied warranty defined in Instruction No. 13. In effect, it reduced the statement of the law of implied warranty to a statement that the manufacturer is not liable even if he causes the disease his product was intended to prevent if it was reasonably fit "for the public as a whole". Thus, the only legal theory submitted to the jury was a warranty of merchantability. Davis, in the trial below, could recover on only one ground, that is, that the vaccine was not reasonably fit for the public as a whole. Whether it was fit for the public as a whole was left to the jury with no definitions, illustrations or explanation of terms to guide them. Did the instructions mean that plaintiff could recover only if he proved that 51% of those taking the vaccine contracted polio? The jury could have understood that to be the import of the instructions.

In Instruction No. 15, requested by the defendants, the court says that in order to find for us we must have proved that the plaintiff is suffering from paralytic poliomyelitis, that he contracted this disease from the defendants' Type III Sabin vaccine, and that he contracted the disease as a breach of the warranty of fitness, if any, on the part of the defendant.

Nowhere is an implied warranty of fitness defined. If you look at the preceding instruction (Instruction No. 14) and try to determine what an implied warranty of

fitness is, you have to conclude that it means the vaccine was reasonably safe for consumption by members of the public as a whole. Again what is meant by "reasonably safe for consumption by members of the public as a whole" is not defined, nor what is meant by the statement that the "vaccine could be used with absolute safety". Instead, the entire matter is left to the discretion of the jury. This state of confusion resulted in the verdict for the defendant. Wyeth has attempted to take these confusing instructions and turn the only issue that could possibly be construed as having been submitted to the jury, that is, an implied warranty of merchantability into an instruction on strict liability, which it is not.

The various cases relied upon by the defendant in support of its theory that it should not be liable for an implied warranty of fitness are not apropos to our situation. There is only one case decided in the United States to our knowledge in which the issue of implied warranty of fitness for the intended purpose of the drug was raised. That case was the renowned decision in *Gottsdanker v. Cutter Laboratories*, 6 Cal. Rep 320 (Cal. 1960), 79 A.L.R. 2d 290. Recovery was permitted on this cause of action as well as on a cause of action involving an implied warranty of merchantability. The various courts in discussing implied warranty and permitting a recovery based thereon, particularly in the drug field, have confused the two warranties. The court in the Cutter case pointed out that the defendant's vaccine contained live and active poliomyelitis virus. Thus the vaccine was not wholesome; it was neither merchantable nor fit for its intended purpose. The difference between the two warranties is vital.

(See Appendix D) A merchantable warranty applies to the public as a whole. The manufacturer then asserts if it is reasonably fit for the public, he is not liable to the individual. A fitness warranty runs to the individual. The manufacturer warrants that the drug is fit for the individual who consumes it. He warrants that in this particular individual the drug will not cause the disease it is warranted to prevent. In the allergic reaction cases, the implied warranty of fitness is not extended to the individual because he is a member of an abnormal group. Appellees make no claim that Davis is in an abnormal group. They ask the court to reason that if a vaccine produces only a few cases of the disease it is designed to prevent, there is no liability on the manufacturer. In this action, Wyeth asserts as a matter of defense that it need only show that its product was safe for most members of the public. If so, they owe no further duty to their customers. They thus claim that they do not warrant that an individual will not get polio from their product. The cases they cite do not so hold.

The first is *Cornish v. Sterling Drug, Inc.*, 370 F.2d 82 (C.C.A. 8th 1966). The case involved a drug called Aralen, used to treat arthritis. Over a long period of use (four years) it caused blindness. Recovery was allowed the plaintiff in that the company failed to warn the doctor prescribing the drug of its danger. In our case, Wyeth failed to warn the volunteers and the druggist who gave the vaccine of the risk or danger well known to defendant but unknown to plaintiff. The trial court had found that implied warranty of fitness was not involved as the drug was fit to treat arthritis. The drug itself did do what

it was intended to do to the person who purchased it. In the case of *Lewis v. Baker*, 413 P.2d 400 (Ore. 1966) the person who took MER-29 had side effects.

The same is true of the earlier Oregon case of *Cochrane v. Brooke*, 409 P.2d 904 (Ore. 1966). In each case there was a question of whether or not an isolated reaction would breach a warranty of merchantability. In each case the court said no. Neither case involved a warranty of fitness for the intended purpose of the drug. As a matter of fact, in this respect, the MER-29 drug was fit for the purpose it was intended. Its purpose was to reduce cholesterol in the bloodstream. It did do this. It also, however, caused side effects. The drug company did not warrant that it would not cause side effects; it simply warranted that it would reduce cholesterol. These cases would be more analagous to our case if the drug had increased cholesterol in the bloodstream resulting in a heart attack.

The only other case they cite in connection with this matter is *Cudmore v. Richardson-Merrill, Inc.*, (supra). Again this is a MER-29 case with the additional factor that at the time the plaintiff in that case took the drug, apparently the manufacturer didn't know that it did cause side effects.

None of the cases relied upon by defendant support defendant's contention that a drug manufacturer is not liable to a consumer of the product who contracts the malady the product was intended to prevent as a direct result of his consumption of the product. To the contrary, in such case, the manufacturer is held liable because the product is not fit for the purpose intended. *Gottsdanker v. Cutter*

Laboratories, 6 Cal. Rep. 320, *supra*.

FAILURE TO WARN

In its reply to plaintiff's position that the cause of action of failure to warn should have gone to the jury, Wyeth cites a number of allergy cases in defense of its position that it need not warn. The cases cited are those in which it was unknown that a reaction would occur and there was no class of persons to which it would be applicable. The rationale of the rule seems to be that the allergy, not the product, causes an unforeseeable harm. This is certainly not the situation in the instant case. The risk and harm and persons to be paralyzed by Sabin III were well known by Wyeth before its product was fed to Davis. (Of interest in this connection, see Carter, *Breakthrough* (1966), Library of Congress Catalog Number: 65-26621, in particular, Chapter 16). Davis took the Wyeth company's Type III vaccine in March 1963.

On September 15, 1962, the Surgeon General's Oral Poliomyelitis Vaccine Advisory Committee met in Washington, D. C., and reviewed the occurrence of polio cases after the administration of the vaccine.

On September 20, 1962, the United States Surgeon General issued a report (Plaintiff's Exhibits 9 and 11) explaining the results of the meeting.

Further findings were made:

"Of the reported cases to date, 1 following Type I vaccine and 11 following Type III vaccine were considered by the Committee to be clinically consistent

with paralytic poliomyelitis and with laboratory findings which could not exclude a possible relationship to the administration of oral vaccine."

The risk was estimated:

"The incidence, assuming all cases to have been vaccine induced, is but 11 cases among more than 13 million fed. This is less than one case per million doses given. When the risk is related to age it is apparent that adults are exposed to a greater hazard than are children. Inadequate information on the age specific vaccine acceptance rate, however, makes it impossible to calculate a more precise estimate of the risk at this time."

Recommendations were made:

"With the incidence of poliomyelitis at a low level in this country, the Committee therefore recommended that the Type III vaccine be restricted to preschool and school age children and to those adults in high risk groups such as those traveling to hyperendemic areas or in areas where a Type III epidemic is present or impending."

The Surgeon General further stated:

"Present data indicate that for 1962, the paralytic poliomyelitis rate for those under 20 will be approximately 7.6 per million; for those over 20, about 0.9 per million. These rates will represent a record low for the 52-year period since the reporting began."

The report of the Special Advisory Committee on Oral

Poliomyelitis Vaccine to the Surgeon General of the Public Health Service of July 17-18, 1964, pointed out that the incidence of paralytic poliomyelitis declined from an annual level of 14.6 cases per 100,000 in the 5-year period from 1953 to 1957 to a rate of approximately 1.8 for the period 1957 to 1961. They pointed out that this decrease of 88% was largely attributable to the use of inactivated poliomyelitis vaccine (Salk) (Plaintiff's Exhibit 11).

Since 1961 the incidence has declined further; the paralytic case rate for 1963 was 0.2 per 100,000. The Committee pointed out that from 1955 through 1961 400,000,000 doses of inactivated poliomyelitis vaccine were distributed in the United States. A high proportion of the children and more than one-half of the adults in the population received one or more injections of the vaccine. In 1962, 36,000,000 doses were distributed, and in 1963 the amount declined to 19,000,000 doses. Fortunately for the public, most persons were immunized against polio by Salk vaccine before taking the dangerous Sabin product. Some were not. Dick Davis was one of the unfortunates. Were it not for the previous administration of Salk vaccine, the incidence of vaccine induced polio would have been much greater.

The defendant's argument that the plaintiff in this case only had one chance in 2½ million of acquiring polio when he took their vaccine in 1963 ignores the fact that in Montana in 1963, there were no reported cases of polio. In 1964, there were no reported cases; and in 1965, there were no reported cases (Plaintiff's Exhibit 13, Tr. 352). The plaintiff's polio case was recorded as being from the state of Idaho. The chances of the plaintiff not getting

polio if he had stayed in Montana and not taken the defendant's drug were 100%. Whereas, by taking the defendant's drug, he had a 100% risk of getting the disease. (Dr. Ravenholt's testimony, Tr. 495).

In December 1962, again some months before Mr. Davis bought the Wyeth product that gave him the disease, the Surgeon General's Special Advisory Committee on Oral Poliomyelitis Vaccine issued another report. This one was dated Decembred 18, 1962 (Plaintiff's Exhibits 10 and 11). The Committee found:

"On the basis of data now available, the total number of cases associated in time with the direct administration of Type III vaccine and considered by a committee majority as 'compatible' is now 11, of which 8 are over 30 years of age."

The Committee recommended:

"It is therefore recommended: (1) that community plans for immunization be encouraged, using all three types, and (2) that immunization be emphasized for children in whom the danger of naturally occurring poliomyelitis is greatest and who serve as the natural source of poliomyelitis infection in the community. Because the need for immunization diminishes with advancing age and because potential risks of vaccine are believed by some to exist in adults, especially above the age of 30, vaccination should be used for adults only with full recognition of its very small risk. Vaccination is especially recommended for those adults who are at higher risk of naturally occurring disease; for example, parents of young children, pregnant women, persons in

epidemic situations and those planning foreign travel.”

Doctor Langmuir, a member of the 1962 and 1964 Surgeon General’s Committee testified as to the risk in 1962:

“I think what I said before, that rural persons are more likely to be susceptible to polio than those having an urban background; upper class persons more likely than lower class persons based, we believe, on the risk or opportunity of prior exposure to wild polioviruses. So a person who is likely to be more susceptible, with freedom of past experience, exposed to a risk that would be more likely to develop the disease after such exposure than a person who was immune.” (Tr. 369, L. 11-19)

Doctor Ager, a member of the Surgeon General’s Committee in 1964 testified as to the known risk in 1962:

“My opinion of the risk was and is that it is somewhere in the neighborhood of one in two or three hundred thousand vaccinations of adult males.” (Tr. 517, L. 15-18)

Consequently, it was well known in 1962 that Sabin vaccine caused polio. Plaintiff’s evidence showed the people who would probably contract polio from taking Sabin vaccine were in the following categories: (1) those who had no Salk shots; (2) males over 30 years of age; (3) those residing in non-epidemic areas and rural areas; (4) those in the upper socio-economic group; and (5) those residing in the Pacific Northwest. This information should have been divulged to people purchasing Wyeth products. The company knew that its product would cause the dis-

case it was supposed to prevent in certain persons. Wyeth even knew mathematically how many would get the disease. Moreover, for those persons over 30 in whom there was a risk, there was a perfectly safe, reliable product that could be taken to immunize. That was Salk vaccine. Doctor Alexander Langmuir, heretofore quoted, is one of the truly great pioneers in the field of medicine. At the time of taking his deposition, Doctor Langmuir was Chief of the Communicable Disease Center, United States Public Health Service. As a matter of fact, he had just been awarded the Brofman Award of the American Public Health Association. Doctor Langmuir testified that there have been no reported cases of paralytic disease associated with Salk vaccine since 1955. (Tr. 377) He believed there was no danger in taking Salk vaccine (other than needle fright).

These things, of course, were all known to Wyeth Laboratories in 1962. Nonetheless, they went ahead with their mass immunization plan of adults.

Wyeth now claims that it warned of the risk by warning some doctors in Idaho Falls, Idaho, and that the doctors should have evaluated the risk before proceeding. Mr. Davis was not in Idaho. He was in Montana.

Wyeth knew there was no doctor in West Yellowstone, Montana (Tr. 106) They knew there would be no doctor in attendance. They knew that the clinic was going to be attended only by a pharmacist, and they knew there would be no prescription and no warning.

Even the jury was misled on this point. In Mr. Evans' closing argument to the jury he pointed out that Wyeth's

book on how to hold clinics (Plaintiff's Exhibit 26, Tr. 9) recommends strongly that a doctor be in attendance at the clinics. Mr. Evans pointed out that a doctor was present in Eastern Idaho, but at the one held in West Yellowstone, Montana, there was no doctor present. Mr. Roden objected on the grounds that there was no evidence to that effect, and the trial judge ruled as follows:

"That is correct. The evidence does not so show. He said there was no doctor in West Yellowstone." (Tr. Vol. IV 9, L. 22-23)

The record reveals that when Mr. Davis was on the stand testifying he named every person who was in the room when he took the Type III polio vaccine. On page 129 of the transcript (lines 2-5) he was asked the questions:

"Was a doctor there?"

"No, sir."

"Did a doctor prescribe the vaccine for you?"

"No, sir."

The ruling and comment told the jury to the contrary, erroneously.

The Wyeth detail man, Franklin, contacted Bob Brower (the pharmacist in West Yellowstone) in January 1963, advised him that West Yellowstone was to be included in the "K. O. POLIO" campaign, found out how many doses of the vaccine to send, and subsequently sent them. (Tr. 169-171) Wyeth now claims that it did so because an Idaho doctor, Doctor Krueger, advised it to "send vaccine to West Yellowstone", (Tr. 110, L. 11) whatever that

means. Send it they did, and there is no evidence of a warning to either Brower or the people of West Yellowstone other than a package insert, unread by the pharmacist. The fact that there was a package insert does not meet the requirements of a warning. Bob Brower, the druggist who administered the vaccine in West Yellowstone, is not a doctor and cannot give medical advice and could not prescribe this vaccine for persons who wanted to take it nor could he warn of the hazards in taking it. We do not think that the package insert is even relevant unless it is related in some way to Mr. Davis or at least to a physician. However, the best that can be said for it is that it creates a jury question. Whether or not a package insert constitutes a warning is a conclusion now asserted by Wyeth trying to reinstate our cause of action on failure to warn and having this court rule as a matter of law that there was a warning. The cause should have been submitted to the jury for its determination.

The all-media propaganda program of Wyeth did not even hint at a risk. The Wyeth agent even sent a poster to West Yellowstone to be used in connection with the vaccine. (Tr. 61) The poster was devised by Wyeth. The poster said "K. O. POLIO". It has not one word about the risk in taking the Wyeth product or the fact that Wyeth knew the vaccine would cause the disease. Plaintiff relied on the poster. (Tr. 126)

It is little wonder, therefore, that when the Surgeon General's Polio Committee met in 1964 with considerable number of new personnel and reviewed the tragic histories of people such as Mr. Davis who took a product in an effort to help stamp out polio and now find them-

selves in a wheelchair that they again recommended:

“The vaccination of individuals over school age (about 18 years) should generally be recommended only in those situations in which unusual exposure to poliomyelitis might be anticipated, such as epidemics, entry into military service, and travel to other countries.” (Plaintiff’s Exhibit 11)

As to findings, the Committee had 87 reported cases from non-epidemic areas. Of these, 57 were judged by the Committee to be compatible with having been induced by the vaccine. Certain other cases were classified as uncertain, and certain cases were excluded. Doctor Ravenholt commented:

“Yes, and it also excluded quite a few cases which would ordinarily be called poliomyelitis, but would be excluded because of the rigorous conservative criteria used by the Surgeon General’s Committee of a compatible case.” (Tr. 489)

The compatible cases were further classified into probable and possible categories. One of the probable compatible cases was that of the plaintiff in the instant case, Glynn Richard Davis. It is little wonder that the United States Surgeon General’s Committee would so find. As we all know, the defendant has the right to have the plaintiff examined by a doctor of its own choice. It elected to fly him to Los Angeles, California, to be examined by Doctor Howard S. Barrows, who is a professor of neurology at the University of Southern California, School of Medicine, and one of the outstanding experts on neurology in the

United States. The concluding paragraph of his report reads as follows:

“Despite any questions or confusion concerning dates, war injuries, work injury, possible drug addiction or alcoholism there is no doubt that this patient developed a febrile disease followed by paresthasias and a progressive assymetrical motor weakness of a lower motor neuron type that has left him with an atrophic, flaccid paraplegia. The progression of his weakness stopped after the fever subsided and he had cerebrospinal fluid pleocytosis without protein elevation acutely. There apparently was muscle tenderness and nuchal rigidity. These facts on record and his present findings are, again, consistent with acute infectious poliomyelities and *not* at all suggestive of polyradiculo-neuropathy Guillain-Barre), multiple sclerosis, amyotrophic lateral sclerosis, spinal cord disease, herniated disc or conversion hysteria.” (Defendant’s Exhibit 50) (Emphas~~is~~s supplied by Dr. Barrows)

This paragraph describes a condition that the company knew it would create when it released its vaccine for sale in 1962.

Whether Wyeth had to warn Davis before they gave him the disease; whether or not giving a man polio by virtue of a product that is supposed to suppress the disease breaches a warranty of fitness to that individual; whether Wyeth is strictly liable; whether a pathogenic vaccine is a product with a defect; whether proof may be made of negligence through *res ipsa loquitur*; are questions that were never submitted to the jury after two weeks of trial.

The trial court deprived the jury of all legal theories except warranty of merchantability. The court's theory of the case and that of the defense was that if the defense could show that the product was reasonably fit for the public at large, they were exonerated and the plaintiff could not recover. That was the sole issue submitted to the jury and essentially, that is the sole issue the defense is trying to submit to this court on appeal. The matter is not so simple.

If the Davis injury is a cost of social progress, it is a cost that should be shared by all who benefit from the harmless use of the vaccine. The manufacturer is best able to compensate injured persons by insurance or otherwise and to distribute the cost of compensation or insurance as a typical price of the insurance by increasing the price paid by all persons who benefit from the use of the vaccine. 65 Yale Law Journal 262. Wyeth is a profit-making institution. They were producing and selling a vaccine under license from Doctor Sabin who developed it. They made a profit on the product. They knew that a certain number of people would be paralyzed as a result of taking its vaccine. We were not permitted by the judge to go into the amount of profit Wyeth made. We thought it would be an appropriate answer to their humanitarian argument, but perhaps the answer put forth in the Cutter case is sufficient, where the court said such an argument seemed to be of little weight where the warranty is limited to an assurance that the product will not actively cause the very disease it is designed to prevent. Whatever the legal theory is called, recovery should be permitted to Mr. Davis. It is now conceded all around

that he has polio because he took their vaccine. He did it at a time when the public was being urged strongly in all media of advertising to take the vaccine. In West Yellowstone, Montana, the response was overwhelming. People did 'this to stamp out polio. There were victims of this war. Dick Davis was one. The case should be remanded to the court below on the sole issue of damages.

Respectfully submitted

ELAM, BURKE, JEPPESEN & EVANS

by.....

Blaine F. Evans

by.....

Robert J. Koontz

by.....

Karl Jeppesen

Attorneys for Appellants

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ELAM, BURKE, JEPPESEN & EVANS

by.....

Blaine F. Evans

Attorneys for Appellants

ACKNOWLEDGEMENT OF SERVICE

Service is hereby acknowledged of receipt of three (3) copies of the above and foregoing brief.

DATED: April -----, 1967.

RICHARDS, HAGA & EBERLE

by.....

Attorneys for Appellees

APPENDIX A

Doctor Ravenholt

Page 437 — Lines 6 through 22

Q Doctor, prior to the year of 1962, what was the most prevalent type of polio in the United States on important cases?

MR. RODEN: Object, as leading and suggestive, and there is no foundation for such an opinion.

THE COURT: He may answer.

THE WITNESS: There are three types of poliomyelitis—three immunological—and before the immunization, Type I was the leading type, responsible for eighty-five percent of the paralytic disease in the United States; and Type II was responsible for two or three percent; and Type III for the balance.

BY MR. KOONTZ:

Q After the introduction of the vaccine?

MR. KADING: I am going to object to further questioning. The question has been answered.

THE COURT: Objection sustained.

Page 442 — Lines 7 through 17

BY MR. KOONTZ:

Q Based on your physical examination of the plaintiff, the reports at Ashton, at Idaho Falls, and the Elks, and the Veteran's in Boise, and the laboratory reports and the history, do you have an opinion within a reasonable medical probability what type of acute poliomyelitis he has?

A Yes.

Q What is your opinion, Doctor?

A My opinion that his poliomyelitis was in all probability caused by Type III virus—vaccine virus.

Page 442 — Lines 24 and 25

Q Doctor, upon what do you base this opinion?

A The facts that he had poliomyelitis is clearly indicated by the nature of his illness, an acute feverish illness,
Page 443 — Lines 1 through 13

and the central nervous infection, and accompanied by the development of severe paralysis of his lower body, which is compatible with the disease we call poliomyelitis, and not within my knowledge of any other disease. The fact that it is in all probability caused by a Type III vaccine virus is a function of the fact that his illness occurred in West Yellowstone, Montana, in the early spring when there was no known natural occurrence of polio within a wide range, and within an incubation period after taking the Sabin Type III vaccine, which is known to be able to cause paralysis in adults under these circumstances.

Page 444 — Lines 14 through 25

Q What types, generally—what are the percentages, generally, of the types of polio subsequent to 1963?

A Before the introduction of immunization, Type I was responsible for the great majority of poliomyelitis in the United States, and during the years of wide spread use of Salk vaccine, Type I was responsible for a greater degree of the total poliomyelitis occurrences. Since the introduction of the Sabin vaccine there was a remarkable increase of the occurrence of Type III, and it is known

that this is in all probability due to the vaccine.

Page 445 — Lines 12 through 15

Q Getting back to the question, was there any epidemiological significance after the vaccine?

A Yes. This is a new pattern of the distribution of poliomyelitis in the United States.

Page 446 — Lines 6 through 25

The Type II Sabin is probably entirely nonpathogenic and the Type I has very little capacity for the pathogenesis, and the Type III retains a virulence or pathogenicity.

Q Upon what facts do you base the statements that the Type III retains its pathogenicity?

A It was known—a measure can be obtained by studying the effect in experimental animals. The injection of the virus in the monkeys, it has been a common test of virulence and it was known.

Q You use the term “virulence”; what is that?

A That is a measure of the degree of pathogenicity. We speak of something being virulent when it has a large disease producing capacity, and it was known by the studies of Doctor Melnick in Houston in 1960 and 1961, that the Type III strain which was being used experimentally by Doctors Sabin did retain a neurovirulence for monkeys when injected. It was somewhat virulent, and there was a hesitation to releasing the vaccine because of th knowledge, and that is the reason that the Type III

Page 557 — Lines 1 through 4

was not licensed as early as Type I or Type II. Type III was not licensed until March of 1961, because there was

a waryness of its qualities. Then it was released.

Page 451 — Lines 18 through 25

BY MR. KOONTZ:

Q Doctor, do you have an opinion as to whether or not the Sabin Oral vaccine, Type III, administered in March of 1963 has a pathogenitic characteristic?

A Yes, I —

THE COURT: You have answered the question.

BY MR. KOONTZ:

Q What do you base your opinion upon?

Page 452 — Lines 1 through 9

A I base the opinion on the knowledge which had been accumulated by the United States Public Health Service by that date concerning the occurrences of paralytic poliomyelitis among adults who had received Sabin Type III vaccine during the previous year and a half.

Q What is that opinion?

A It is that Type III Sabin oral vaccine remains pathogenic for adults.

Page 453 — Lines 14 through 20

Q Doctor, do you have an opinion as to whether or not in March of 1963, there was a risk in adults taking the Type III Sabin vaccine?

A Yes.

Q What is the opinion?

A It was known that it was hazardous for adults to

take Type III Sabin vaccine.

CROSS EXAMINATION

Page 457 — Lines 16 through 25

Q How much emphasis would you place on this with your conclusion that he had poliomyelitis Type III?

A Well, my understanding of this is particularly on the basis that he did have a disease which seems entirely typical of poliomyelitis to me, and Type III poliovirus was isolated repeatedly from his stool and it was vaccine like according to the Communicable Disease Center, and in this context, the history that he did take the Type III Sabin vaccine within the incubation period of his illness seems significant.

CROSS EXAMINATION

Page 473 — Lines 15 through 23

Q And the conclusion that you have to arrive at is that it is consistent with the causation of the disease by Type III, and inconsistent with it?

A If Mr. Davis had not developed poliomyelitis I would say there was no reason to think that it caused poliomyelitis. And in view of the facts that he did develop acute poliomyelitis and this was the only agent identified from him at this time, I think that it is reasonable to ascribe his illness to that agent.

CROSS EXAMINATION

Page 478 — Lines 19 through 25

Q What do you mean?

A That it occurred in late winter or early spring in West Yellowstone, Montana, independent of any other known occurrence of poliomyelitis, and particularly Type III poliomyelitis in this community. If, for example, his illness had occurred in a midst of epidemic Type III, then it would have had a somewhat different significance.

Page 479 — Line 1

CROSS EXAMINATION

Page 479 — Lines 9 through 17

Q The fact that it occurred in West Yellowstone in March, what is the significance of the date?

A That is the time of the year when there is the least prevalence of the virus, and in 1963 there was very little prevalence of the natural virus compared with five or ten years before, and it occurred at the time of the year when the natural virus is least prevalent, and in a part of the country where it would be least prevalent.

Page 486 — Lines 11 through 19

CROSS EXAMINATION

Q Nevertheless at least in your opinion it would be intelligent to immunize susceptible people?

A We do not deem it advisable to give the oral vaccine in adults because of the availability of an excellent immunizing agent in the Salk vaccine, which at this time was not known to cause—which was rather completely devoid of any risk in adults, so why use something that is risky if you have something that is not risky.

CROSS EXAMINATION

Page 489 — Lines 16 through 24

Q The table nine does relate to the compatible cases that the Surgeon General's committee had left in the picture which by definition excluded the epidemic areas?

A Yes, and it also excluded quite a few cases which would ordinarily be called poliomyelitis, but would be excluded because of the rigorous conservative criteria used by the Surgeon General's committee of a compatible case.

CROSS EXAMINATION

Page 494 — Lines 20 through 25

THE WITNESS: If Mr. Davis had not become ill, one may have found the vaccine virus in the stool, and the antibody findings in the blood, but the fact that poliomyelitis did occur and no other organism is reasonably implicated as a cause, to me indicates that in all probability

Page 495 — Line 1

his illness was caused by the vaccine virus.

DOCTOR AGER

Page 514 — Lines 2 through 4

A My opinion is that Mr. Davis contracted acute anterior poliomyelitis from Type III poliomyelitis vaccine.

Page 517 — Lines 15 through 18

THE WITNESS: My opinion of the risk was and is that it is somewhere in the neighborhood of one in two or three thousand vaccinations of adult males.

Page 524 — Lines 17 through 23

A I will read two sentences. "After several hours of study and evidence, the committee adopted the resolutions and that it be sent to each of the state and territorial health officers, associations. Recommendation No. 2, recommended that the nonepidemic use of Type III oral vaccine be restricted to preschool and school age children."

Page 525 — Lines 5 through 7

Q In September of 1962, this had gone to all state health officers?

A That is correct.

Page 536 — Lines 1 through 11

that was made: "That there was no apparent association of cases with specific lots of vaccine and vaccines produced by a particular manufacturer". That is on the bottom of page four.

A The statement I don't think is quite accurately stated, but I do in essence agree with it. If I can clarify it for your benefit; there is a clustering with certain manufacturers and certain periods of manufacture, but these were closely related to the output of vaccine. The more doses, the more cases occurred so that company or that period of time, it balances out.

APPENDIX B

Doctor John H. Brown, Veterinarian, Assistant Vice-President of Wyeth Laboratories (Tr. 655, L. 7-25)

“BY MR. EVANS:

Q Are you familiar with a virological theory called the hot particle theory?

A Yes, sir.

Q Is this a theory generally accepted in virology?

A Yes, sir.

Q And is this particular theory applied in the field of virology to Sabin vaccine?

A Yes, sir.

Q Will you state for us what that theory is?

A The theory is applied to the Sabin vaccine and covers the following circumstances: That if in the seed used to make the vaccine, there was one hot particle of virus, which virtually, by the way that the virus is grown, and handled, that would multiply in hundreds and thousands of particles so that in the resulting vaccine there would be an abundance of hot particles, and they would be very well demonstrated in the tests we apply. And in the theory, it does not seem possible that the one hot particle situation could apply to the seed for the vaccine.”

Doctor Alexander D. Langmuir, a member of the United States Surgeon General's Committee on Oral Poliomyelitis Vaccination (Tr. 379, L. 5-17)

“A I think in general there are two theories: One,

that a certain residual number of particles in the vaccine retain their virulence and in an occasional monkey are able to cause this slight degree of inflammation. The other theory is that it is a biological property of the vaccine virus to occasionally mutate to virulent form, and when this mutation occurs the frequency of the mutation, I think is quite problematic and quite controversial.”

APPENDIX C

INSTRUCTION No. 13

“In this case plaintiffs seek to recover against defendants for breach of warranty.

“One of the elements of a sale of goods may be a representation or promise by the seller that the goods possess certain characteristics. Such a representation or a promise is called a warranty. It may be made expressly in so many words by the seller, or it may be implied from the circumstances of the sale. As used in these instructions, the word ‘seller’ includes the manufacturer of the product involved and the word ‘buyer’ includes the user or consumer of the product.

The law provides for implied warranties in certain cases. In this connection, I instruct you that where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment, whether he be the manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose. If you find from a preponderance of the evidence in this case that the plaintiff Glynn Richard Davis expressly or by implication made known to the seller the particular purpose for which the vaccine was required, and you further find that the plaintiff in making this purchase relied upon the defendants’ skill and judgment, then under such circumstances, there would be an implied warranty that the goods would be reasonably fit to immunize the plaintiff against the disease of poliomyelitis.

If you find and believe from a preponderance of the evidence that there was such an implied warranty on the part of the defendants as to their vaccine, and you further find that the plaintiff Glynn Richard Davis contracted the disease of poliomyelitis as a direct and proximate cause of the ingestion or taking of defendants' vaccine, then defendants would have breached their implied warranty, and you should find for the plaintiffs.

However, if you find from the evidence that there was no such implied warranty or breach thereof on the part of the defendants or that plaintiff Glynn Richard Davis did not contract poliomyelitis as a direct and proximate cause of taking defendants' vaccine, then on either or both of such findings your verdict should be for defendants."

Instruction No. 14:

"In considering the question of breach of an implied warranty, you are instructed that the implied warranty involved in this case is that the vaccine was reasonably fit for the particular purpose for which it was manufactured. In other words, under such circumstances, the law imposes upon defendants a warranty that the Sabin vaccine, which it manufactured and supplied, was reasonably fit and reasonably safe for consumption by members of the public as a whole. This warranty does not mean, however, that this vaccine could be used with absolute safety, but means only that the vaccine must have been reasonably fit and reasonably safe for use by the public as a whole."

Instruction No. 15:

“Before you can find for the plaintiffs and against the defendants, the plaintiffs must prove by a preponderance of the evidence, the following:

That plaintiff, Glynn Richard Davis, is suffering from paralytic poliomyelitis; that he contracted this disease from defendants’ Type III Sabin polio vaccine; and that he contracted the disease as a proximate result of the breach of an implied warranty of fitness, if any, on the part of the defendants.”

APPENDIX D

Green v. American Tobacco Company, 325 F.2d 673 (1963) p. 681; Judge Cameron concurring in part and in part dissenting.

“It would, in my opinion, be a complete rejection of the law of warranty to hold that it could abrogate the requirement that one admittedly injured by the use of tobacco could not recover unless he showed further that the cigarettes were not reasonably fit and wholesome for use by the general public. Those words are used in the warranty to demonstrate the universality of its application. Every sale it makes carries a warranty to each and every member of the public. But each warranty is separate and covers the liability of the Tobacco Company to each separate individual to whom a sale is made. The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida with which alone we are dealing.”

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

vs.

D.I. OPERATING CO.,

Add paper
3362
Appellant,

Appellee.

UNITED STATES OF AMERICA,

vs.

UNITED RESORT HOTELS, INC.,

Appellant,

Appellee.

UNITED STATES OF AMERICA,

vs.

DESERT INN OPERATING
COMPANY,

Appellant,

Appellee.

APPELLEES' PETITION FOR REHEARING

WILLIAM SINGLETON
Attorney at Law
109 South Third Street
Las Vegas, Nevada

J. A. DONNELLEY
Attorney at Law
2655 Fourth Avenue
San Diego, California

Attorneys for Appellees

NOV 4 1952

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellant,)	
)	
vs.)	No. 20,293
)	
D. I. OPERATING CO. ,)	
)	
Appellee.)	
)	
)	
<hr/>		
UNITED STATES OF AMERICA,)	
)	
Appellant,)	
)	
vs.)	No. 20,294
)	
UNITED RESORT HOTELS, INC. ,)	
)	
Appellee.)	
)	
)	
<hr/>		
UNITED STATES OF AMERICA,)	
)	
Appellant,)	
)	
vs.)	No. 20,295
)	
DESERT INN OPERATING COMPANY,)	
)	
Appellee.)	
)	
<hr/>		

APPELLEES' PETITION FOR REHEARING

TO THE HONORABLE:

Frederick G. Hamley, Circuit Judge

Charles M. Merrill, Circuit Judge

J. Warren Madden, Judge of the Court of Claims

Appellees hereby petition for a rehearing en banc to reconsider the judgment entered in the above-entitled cause on June 9, 1966, on the following grounds:

1. Appellees believe that this Court in deciding the case overlooked controlling matters of law in that this Court, by its interpretation of the words "conducted for profit", has imported for the first time into the wagering tax statute an element of vagueness and fluidity which makes the constitutionality of the statute doubtful.

Chapter 35 "Taxes on Wagering" is completely cohesive, consisting of Sections 4401 to 4423, inclusive. Section 4413 makes the \$50 occupational tax imposed by Section 4411 a condition precedent to engaging in that business; Section 4414 imposes civil and criminal penalties on offenders by specific reference to subtitle F; Section 4421 defines wagers, which definitions form the basis for the imposition of the civil and criminal sanctions referred to in Section 4414.

The Committee Reports dealing with the wagering tax (Sen. Rep. No. 781, 82nd Cong., 1st Sess. 1951-2 Cum.Bull. pages 458, 540, 542 and 543) clearly establish the intention of the Senate to make criminal penalties applicable.

Section 7262 (subtitle F of the Internal Revenue Code) provides for fines of not less than \$1,000 and not more than \$5,000 in addition to the payment of the tax. Neither willfulness nor intent is required in order to make the penalties of

Section 7262 applicable.

This court at page 5 of the slip opinion is guided in its interpretation of the words "conducted for profit" by the interpretation of the words "performance for profit" in the copyright statute. It says that "the potential reach of the phrase 'conducted for profit' would appear at least as wide as that of 'performance for profit.' " (Emphasis supplied.) If it can be "at least as wide" it can be wider. To say that the reach of a statute levying an excise tax, the definitions of which are used for imposing criminal sanctions can be even wider than the reach of the copyright statute, which affords the maximum protection to the owner of the copyright, is to say that the Government has no bounds in determining when it may impose the precondition of the \$50 occupational tax and the posting of the occupational stamp before a wagering pool may be conducted. This robs the statute of the definiteness required to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and may subject him to criminal penalties.

In United States v. Harriss, 347 U. S. 612 (1954), the Supreme Court said at 617:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

In United States v. Cardiff, 344 U. S. 174 (1952) the Court said at 176:

"* * * The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid* * * may be as much of a trap for the innocent as the ancient laws of Caligula."

Furthermore, because this statute is the basis for the imposition of criminal and civil sanctions, if the statute is, as this Court says on page 5 of its slip opinion, "not so clear and unambiguous", its constitutionality is now in doubt.

After the briefs in this case were filed the Supreme Court on March 21, 1966, decided Malat v. Riddell, 86 S. Ct. 1030, which reversed a panel of this Circuit and held for the taxpayer in an income tax case. The Supreme Court said at 1032:

"As we have often said, 'the words of statutes--including revenue acts--should be interpreted where possible in their ordinary every-day senses.'" (Emphasis supplied.)

2. The Court has misread the Committee Reports and in doing so has overlooked controlling matters of law. Page 6 of the slip opinion states that:

"There is no question that the regulation was properly applied in this case. The committee reports accompanying the statute state that the tax was not meant to apply to the purely 'social' or 'friendly' type of betting pool sometimes organized among friends or other associates. * * * While the Desert Inn's calcutta was an invitation-only affair, it was hardly the kind of 'social' or 'friendly' pool whose exclusion from the tax was contemplated by Congress."

The Court has read the language from the Committee Reports dealing with a definition of a wager for purposes of what is now Section 4421 (1) (A) into Section 4421 (1) (B) which is the only section applicable to this case. The Committee Reports described the three types of wagers, now known as Section 4421 (1) (A) (B) and (C). In dealing with the wagers on sports events or contests in Section 4421 (1) (A), the Senate Committee Report on the page referred to in the slip opinion, said:

"Wagers on sports events or contests, to be taxable, must be placed with a person engaged in the business of accepting such

wagers. The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet. * * *

The slip opinion has completely overlooked the part of the Committee Reports, p. 540, dealing with said subsection (B), where specific examples of a wagering pool conducted for profit are given as follows:

"The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

Desert Inn's wagering pools were expressly excluded from the wagering tax by the language of the statute and of the Committee Reports. Webster's Unabridged New International Dictionary, Second Edition, defines "associate" as "one associated with another * * * by a community of interest." The undisputed facts are that the participants in this pool were clearly associated by a community of interest. The pool was occasionally organized, once a year. All the contributions were distributed to the winners and on their behalf to the Fund. No direct or indirect admission fee was charged the participants.

3. The holding of the Court in this case has developed an intra-circuit conflict. This Court says in effect on page 5 of the slip opinion that since there were two lines of cases presented defining the words "for profit" -- one the excise tax cases requiring a strict construction of a direct profit, and the copy-right cases requiring a broad construction -- the wagering tax is not clear and unambiguous.

The Court in doing so ignored its own en banc decision in Fisher Flouring Mills Co. v. U.S., 270 F.2d 27 (1959), wherein it held that excise tax statutes were to be strictly construed and held a Treasury Regulation invalid. In Fisher the Court said at page 31:

"This Court has applied the rule of these authorities:

" 'The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. ' "

4. In the event that a rehearing is granted, Appellees desire to reargue the applicability and controlling influence of the cabaret tax cases and to suggest that the Court has misread the pre-1942 cabaret tax statutes.

5. A rehearing is not sought in respect of any other questions.

6. It is respectfully suggested that it would be appropriate for this case to be heard en banc to the end that it may be determined whether the interpretation by this Court in the slip opinion of the language of the statute affects its constitutionality and also whether or not the opinion has caused an intra-circuit conflict to exist.

Respectfully submitted,

WILLIAM SINGLETON
J. A. DONNELLEY

/s/ J. A. DONNELLEY

Attorneys for Appellees

I, J. A. Donnelley, one of the attorneys for the Appellees, certify that in my judgment this petition is well founded and that it is not interposed for delay.

/s/ J. A. DONNELLEY

No. 21,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD.,
a corporation,

Appellant,

vs.

E. B. WELCH,

Appellee.

APPELLANT'S BRIEF

LILLICK, GEARY, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,

FREDERICK W. WENTKER, JR.,

311 California Street,

San Francisco, California 94104,

Attorneys for Appellant.

FILED

NOV 23 1966

WM. B. LUCK, CLERK

Subject Index

	Page
Jurisdiction	1
Statement of the case	2
Specification of errors	5
Summary of argument	5
Argument	6
I. The court's finding that the carrying of the 42-pound crosshead was "rated as a two-man job" is supported by no evidence and is clearly erroneous	6
II. The District Court applied an incorrect legal standard in finding the vessel unseaworthy because there were not two men assigned to carry the crosshead	10
Conclusion	14

Table of Authorities Cited

Cases	Pages
American President Lines v. Redfern, 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.)	11
June T., Inc. v. King, 290 F.2d 404, 1961 A.M.C. 1431 (5th Cir.)	10, 11
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 1960 A.M.C. 1503	10
Victory Carriers, Inc. v. Guiton, No. 20,405 (9th Cir.)	12
Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247, 1966 A.M.C. 1844 (2d Cir.), cert. granted, 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 233)	10, 12
Statutes	
Jones Act (46 U.S.C. Section 688)	2
28 U.S.C. Section 1291	1
28 U.S.C. Section 1333	1

No. 21,016

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation, vs. E. B. WELCH,	} <i>Appellant,</i> <i>Appellee.</i>
--	--

APPELLANT'S BRIEF

JURISDICTION

Jurisdiction of this Court exists, by virtue of 28 U.S.C. § 1291 and a Notice of Appeal (R. I, 51)¹ filed on February 21, 1966, from a Final Decree (R. I, 49) in Admiralty entered in the United States District Court for the Northern District of California on November 24, 1965.

The District Court had jurisdiction, under 28 U.S.C. § 1333, by virtue of a seaman's Libel (R. I, 1) for damages

¹The record in this case consists of 3 volumes and various exhibits. References to the numbered volumes are by volume and page, e.g., (R. I, 17). Two depositions, those of Pak and Goodheim, were taken by Welch before trial and were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g., (Pak, 33). All other exhibits are referred to by their original designations, e.g., (Resp. Exh. B).

under the Jones Act (46 U.S.C. § 688) and the General Maritime Law.

STATEMENT OF THE CASE

E. B. Welch, a licensed Chief Engineer in the United States Merchant Marine (R. II, 5), was employed by American President Lines (R. II, 5), owner and operator of the SS PRESIDENT ROOSEVELT (R. II, 4) as a third assistant engineer, earning approximately \$1,000 per month (R. II, 51, 52).

On February 18, 1964, en route from San Francisco to Los Angeles, Welch noticed that a pump in the forward engine room was functioning improperly. Welch was responsible for the general maintenance of this pump, in addition to his normal work "on watch" in the forward engine room of the SS PRESIDENT ROOSEVELT (R. II, 53, 54). On the morning of February 19, 1964, when the vessel was in Los Angeles Harbor, First Assistant Engineer Pak instructed Welch to "Take the pump apart, disassemble it and find out what is wrong and fix it." (R. II, 56). Welch did not expect detailed instructions (R. II, 74).

Welch and Pak had worked together many years on several of American President Lines' vessels (R. II, 52) and Welch had great respect for Pak's ability (R. II, 53). Moreover, American President Lines had great confidence in the ability of Welch (R. III, 5). There was no reason to anticipate that the repair task assigned to Welch would be done improperly.

Between 9:00 A.M. and noon an oiler was helping Welch. During the morning they disconnected the two pistons and crosshead and laid them on the deck (R. II, 65). At noon the oiler disappeared and Welch assumed that he went off watch (R. II, 16). Welch did not seek additional help nor did he ask Pak for any (R. II, 68). Welch did not look for Pak (R. II, 69) nor look around the engine room for any additional help (R. II, 68). Nor did he ask the Engine Storekeeper, another person with authority to turn out additional helpers, for any help (R. II, 69).

The pump crosshead is a two-piece cast iron block, about six inches square, which is held together by four studs (Resp. Exhs. A, B, C). Before Welch started the job he conferred with Pak about the defective pump and they surmised that the trouble was a loose piston nut but they could not tell which piston nut was loose (R. II, 92). Later, during the dismantling, Welch discovered that the trouble was in the crosshead. If their surmise had been correct, it would *not* have been necessary to carry the crosshead away from the pump site (R. II, 92).

At about 2:00 P.M. Welch carried the crosshead alone from the site of the pump up a stairway or "ladder". While attempting to step across the threshold of a doorway from the engine room into the machinery repair space, he felt a "pop" in his back, which the Court found to be the cause of his disability.

Welch testified that the crosshead, when bolted together as he was carrying it, weighed between 110 and 125 pounds (R. II, 15). He had tried to dismantle it first at the pump site, but could not do so (R. II, 87). Pak did

not tell Welch to carry the crosshead alone (R. II, 56). Welch, therefore, was the only person who knew that the crosshead could not be completely disassembled at the pump site and that it had to be moved. He believed he was physically capable of carrying the crosshead, even though it was still bolted together (R. II, 85).

Welch testified, and there is no evidence to the contrary, that it was usual and customary for an Engineering Department employee to carry weights up to 80 or 90 pounds and that he had done this. His complaint was simply that the crosshead was too heavy for him to carry because it weighed 110 to 125 pounds (R. II, 62).

As the Court noted toward the conclusion of the cross-examination of Welch, it was hard for the Court to understand how a block of this size could weigh that much (R. II, 87). The vessel later proved conclusively that it weighed only 42 pounds (Resp. Exhs. C, D), or about one-third of what Welch and his fellow engineering officers attempted to have the Court believe.

The Court found that the vessel was unseaworthy because the carrying of the crosshead "was rated aboard Respondent's vessel as a two-man job." (R. I, 43). Appellant denies that there is any basis in the record for this Finding. There is testimony that the carrying of a 110 to 125 pound crosshead would be a two-man job (R, II, 20; Pak, 9; Goodheim, 5). Welch (R. II, 60) and Pak (Pak, 23) admitted that no one had ever carried the crosshead before. There is no evidence in the record that the industry custom and practice requires two men to carry a 42-pound crosshead. The Court did not find negligence, but held that Respondent's failure to furnish

Libelant with an additional man in the afternoon to transport the crosshead to the machine shop rendered the vessel unseaworthy (R. I, 44). The Court also found 50% contributory negligence because Welch did not request help (Finding 20, R. I, 47). This Finding has been cross-appealed.

SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. The District Court's Finding No. 6 is clearly erroneous to the extent that it states that carrying the crosshead in this case was rated as a two-man job, since there was no evidence that the carrying of such a 42-pound crosshead was a two-man job.

2. The District Court erred in finding and holding (Finding No. 8; Conclusion No. 2) that the vessel was unseaworthy because it failed to provide two men to carry the 42-pound crosshead, since the carrying of such an object by one man was within usual and customary standards and the warranty of seaworthiness with respect to crew requires that the vessel be adequately manned overall but not that a particular number of men be assigned to perform each task aboard.

SUMMARY OF ARGUMENT

1. It was conclusively shown that the crosshead carried by Welch and supposed to have caused his disability weighed 42 pounds. It was shown, without contradiction, that weights much in excess of this were proper for one

man to carry. The only evidence upon which the finding of impropriety was based was discredited testimony that the crosshead weighed about 100 pounds and that the carrying of such weights called for two men. Hence the finding that the carrying of the crosshead was a two-man job was unsupported by the evidence and clearly erroneous.

2. The requirement of the warranty of seaworthiness that the vessel be reasonably fit for the service in which she is intended to be employed, as applied to the sufficiency of the crew, requires only that the overall manning of the vessel be adequate and not that there be the number of men which hindsight might suggest lifting each weight, pulling each line or otherwise engaged in each task aboard. The Court below, after erroneously finding the carrying of a 42-pound weight to be a two-man task, misconstrued this Court's prior ruling as imposing the latter test and ignored the authorities in point holding that the test is based upon adequacy of overall manning.

ARGUMENT

I. THE COURT'S FINDING THAT THE CARRYING OF THE 42-POUND CROSSHEAD WAS "RATED AS A TWO-MAN JOB" IS SUPPORTED BY NO EVIDENCE AND IS CLEARLY ERRONEOUS.

A comparison of the Findings with the transcript indicates that the Court has neglected to mention several important factors. The Court described the crosshead as being "of considerable weight" (R. I, 43). It weighs exactly 42 pounds (Resp. Exhs. A, B, C). Moreover, the Court does not mention that the crosshead consisted of

two blocks which are bolted together with studs and nuts (R. II, 93) and that, when these studs and nuts are dismantled and the two halves are taken apart, each half of the crosshead weighs about 21 pounds (Pak, 19, 20). The Court also failed to state that no one had originally intended to move the crosshead (R. II, 92), or that only Welch later found out that the crosshead would have to be moved, or that Welch alone found out that the two halves of the crosshead could not be separated at the pump site.

The following legal principles are axiomatic:

1. The plaintiff has the burden of proving the allegations of his claim by a preponderance of the evidence.

2. If plaintiff fails to introduce any evidence to support a proposition which he has the burden of proving, he has failed to carry his burden.

3. The defendant does not have the burden of disproving the plaintiff's allegations.

4. If the plaintiff proves that a vessel is unseaworthy, he must also prove that the unseaworthiness proximately caused the injury.

The Trial Court was clearly in error because it rendered a judgment for plaintiff although he did not satisfy the requirements of these principles.

In order to repair the pump it was necessary for Welch to dismantle the pump. This dismantling required a helper—who was present until noon. By that time, as Welch admits, the pistons and the crosshead were dismantled from the pump and were lying on the deck at the pump site (R. II, 65). The Court has commingled the

two separate operations of "dismantling" and "carrying", and has treated them as if they were one task. "The job of *dismantling* this particular pump *and carrying* its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job." (R. I, 43) (emphasis added). But there is no evidence in this record that carrying a 42-pound crosshead was "rated aboard this vessel as a two-man job."

It is not disputed that Welch (R. II, 19), Pak (Pak, 9, 16, 26), and Goodheim (Goodheim, 5) stated that carrying the crosshead from the engine room to the machine shop was a two-man job. These statements were made, however, under the erroneous assumption that the crosshead weighed about 100 pounds (R. II, 15; Pak, 7; Goodheim, 5). Welch testified, before the true weight of 42 pounds was known, that it was usual and customary to carry objects weighing up to 80 or 90 pounds (R. II, 62). Welch's testimony that it was usual and customary for an Engineering Department employee to carry weights of up to 80 or 90 pounds, given under these circumstances, is of great probative value because it is testimony as to facts made without knowledge of the legal consequences of those facts.² This testimony was uncontradicted and

²The Court may be interested in the following concrete illustration of this principle from another part of the record: When the vessel finished its cross-examination of Welch (R. II, 87), the Court asked counsel for the vessel whether or not there was any dispute about the weight of the block because "it seems a lot of weight for a block that is six to eight inches cubed." (R. II, 87). Counsel for the vessel stated, "There is a very vigorous dispute." Welch's counsel then interjected, "This is the first time I heard of a dispute on it." The vessel then terminated cross-examination. Welch's counsel then conducted redirect examination and then rested. The next morning Welch's counsel requested and was granted permission to recall Welch (R. II, 95). Welch then testi-

the reasonableness of the usual and customary practice was not called into question. Moreover, Pak stated (when he thought that the whole crosshead weighed 100 pounds) that carrying one of the halves of the crosshead was a *one-man* job (Pak, 22). A fortiori, carrying this crosshead which really weighed 42 pounds, was a one-man job.

Welch (R. II, 60) and Pak (Pak, 23, 33) had never seen anyone carry this crosshead or a similar one nor had they ever done it themselves before this time. Accordingly, it is clear that all of the evidence showing that the carrying of this crosshead was a two-man job was based upon the concept that the strength of two men was needed to lift and carry a crosshead weighing about 100 pounds. Indeed, during the deposition of Pak, Welch's counsel asked Pak, *after* Pak had stated that the crosshead weighed about 100 pounds, if "the usual and customary way is to carry it manually and [if] that manual carrying requires the strength and agility of two men" and Pak answered, "the whole crosshead, yes . . ." (Pak, 26).

When evidence was introduced to show that the true weight of the crosshead was 42 pounds (Resp. Exhs. A, B, C), there was no longer any room for reasonable men to differ as to its weight. It would only be found that the crosshead weighed 42 pounds. Thus any prior statements that the carrying of the crosshead was a two-man job, made on the erroneous basis that the crosshead weighed 100 pounds, were rendered irrelevant. The find-

fied that after carrying the pistons (not the crosshead) his back "felt tight" (R. II, 99). Compare this with his testimony on the afternoon before he found out about the true weight of the crosshead. He then stated that he had not hurt himself in any way in carrying the pistons and that it was only the crosshead incident which was the cause of his disability (R. II, 67).

ing (No. 6, R. I, 43) based upon those irrelevant statements is clearly erroneous.

II. THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN FINDING THE VESSEL UNSEAWORTHY BECAUSE THERE WERE NOT TWO MEN ASSIGNED TO CARRY THE CROSSHEAD.

The Supreme Court has authoritatively defined the responsibility of a vessel owner for seaworthiness in the following terms, in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550, 1960 A.M.C. 1503, 1512:

“What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship which will weather every conceivable storm or will withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.”

As applied to the numerical sufficiency of the crew, this doctrine means that the vessel, as a whole, must be provided with an adequate crew and not that the number of crewman working at a given task will prove adequate. *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247, 1966 A.M.C. 1844 (2d Cir.). This was all that was held in *June T., Inc. v. King*, 290 F.2d 404, 1961 A.M.C. 1431 (5th Cir.).

After finding, without adequate evidence, that the carrying of 42 pounds was a two-man job, the District Court concluded that the vessel was unseaworthy when that

weight was carried by one man alone and based that conclusion upon *American President Lines v. Redfern*, 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.), and *June T., Inc. v. King*, 290 F.2d 404, 1961 A.M.C. 1431 (5th Cir.) (Conclusion 2, R. I, 47). But the Court below neglected to apply this Court's standard in *Redfern*, which requires a finding of the existence of a "dangerous condition"³ at the time of the accident, such as the stuck sea valve in *Redfern*. There is no finding here of such a "dangerous condition", nor would one be justified. And, as we have already pointed out, *June T., Inc. v. King*, *supra*, relates to inadequate overall manning of the vessel.

With foresight based upon the usual customs and practices, it was perfectly proper for Welch to carry the 42-pound object. In this connection, too, the District Court neglected to give effect to this Court's statement in *Redfern* concerning the effect of industry practices:

"We of course are aware that while an owner has an absolute duty to provide a ship and appurtenances that are seaworthy, nevertheless he is not an insurer of the safety of the crew and the measure of his duty is a ship reasonably fit for service. And we fully agree with appellant that generally the determination of what is reasonable rests upon a comparison of the practices that were followed and the conditions that appear in a particular case with those customarily followed and found in the industry." 345 F.2d at 631, 1965 A.M.C. at 1725.

It is evident that the Trial Judge applied, as one might expect, the same test here as he expounded in his opinion

³345 F.2d at 631, 1965 A.M.C. at 1725.

in *Victory Carriers, Inc. v. Guiton*, No. 20,405 (9th Cir.) to the effect that, despite the absence of any defect, negligence or other impropriety judged by foresight, unseaworthiness follows whenever hindsight shows that injury resulted from a combination of forces involved in the operation.⁴

The case in point was not *Redfern*, but *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247, 1966 A.M.C. 1844 (2d Cir.), *cert. granted*, 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 233), which directly and solely concerned the question whether a vessel could be found unseaworthy when a seaman suffered a back injury carrying a line which, he contended, was so heavy as to require the assignment of more help to carry it. The Court was asked to hold that the jury should be permitted to find unseaworthiness and refused to do so, saying:

“The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been required is that the vessel be properly

⁴“ . . . It means, as best we understand the authorities, a condition of the ship, its gear, equipment and appurtenances as they are then being used which created a hazard to the health or safety of the person to whom the duty of seaworthiness is owed.

* * *

“ . . . The hazards were inherent in the operation, and although injury would not normally be anticipated, it was always inevitable that upon the concurrence of the physical forces which were created by such use of the equipment under conditions then existing, the injury would be suffered in the exact manner it was suffered by Guiton. If this means that shipowners and stevedores must revert to using coolies to stow cargo by hand or must refuse to accept such heavy cargo so packaged to avoid liability for unseaworthiness, so be it. This is all we can make of the recent decisions.” Transcript of Record, pp. 14, 15, in *Victory Carriers, Inc. v. Guiton*, No. 20,405 (9th Cir.).

manned. That is to say, in order to be 'reasonably suitable for her intended service' the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide 'an accident proof' ship, which the teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, *supra*, specifically negates." 356 F.2d at 251, 1966 A.M.C. at 1849.

CONCLUSION

For the foregoing reasons, we submit that this Court should set aside Findings 6 and 8 and Conclusion 2 and reverse the Decree below.

Dated, San Francisco, California,
November 25, 1966.

Respectfully submitted,
LILICK, GEARY, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GRAYDON S. STARING,
Of Attorneys for Appellant.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

Libelant Welch's Exhibits	Identified	Admitted
1 1963 Income Tax Return	R. II, 9	R. II, 9
2 Honolulu Hospital Records	R. II, 33	R. II, 33
3 Report of Injury or Illness	R. II, 34	R. II, 34
4 Marine Hospital Records	R. II, 40	R. II, 41
5 Dr. Rose's Medical Records	R. II, 42	R. II, 43
6 Dr. J. M. Harris' Medical Records	R. II, 43	R. II, 43
Respondent American President Lines, Ltd.'s Exhibits		
A Photograph	R. II, 48	R. II, 48
B “	R. II, 48	R. II, 48
C Crosshead	R. III, 7	R. III, 9
D Weighmaster's Certificate	R. III, 9	R. III, 9

No. 21,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD.,

a corporation,

Appellant and Cross-Appellee,

vs.

E. B. WELCH,

Appellee and Cross-Appellant.

**Appeal and Cross-Appeal from an Admiralty Decree
of the United States District Court for the
Northern District of California**

Honorable Bruce R. Thompson, District Judge

BRIEF FOR APPELLEE AND CROSS-APPELLANT

JARVIS, MILLER & STENDER,

MARTIN J. JARVIS,

EUGENE A. BRODSKY,

123 Second Street,

San Francisco, California 94105.

Attorneys and Proctors for

Appellee and Cross-Appellant.

FILED

JAN 27 1967

WM. B. LUCK, CLERK

Subject Index

	Page
Jurisdiction	1
Introduction	1
Statement of facts relating to the issues of unseaworthiness and contributory negligence	4
Specification of errors on cross-appeal	10
Summary of argument	11
On the appeal	11
On the cross-appeal	12
Argument on the appeal	13
I. Substantial evidence supports the District Court's find- ing that the failure of appellant to provide appellee with sufficient help for the required task rendered the vessel unseaworthy	13
A. Trial court's finding on the factual issue of un- seaworthiness are conclusive unless "clearly erro- neous"	13
B. The finding that appellant's failure to provide appellee with sufficient help for the required task is amply supported by the record	15
II. The District Court applied correct legal standard in finding the vessel unseaworthy	22
Argument on cross-appeal	26
I. The District Court's findings that appellee was guilty of contributory negligence is unsupported by the record and is clearly erroneous	26
A. There is no evidence in the record that additional help was available at hand. There is a failure of proof by the shipowner on this issue	29
B. The failure of the injured seaman to request addi- tional help is not contributory negligence	32
C. Injury resulting from obedience to orders cannot be contributory negligence	35
Conclusion	37

Table of Authorities Cited

	Pages
Aivaliotis v. SS. Atlantic Glory (E.D. Va., 1963) 214 F. Supp. 568	37
American President Lines, Ltd. v. Redfern, 345 F. 2d 629 (9th Cir., 1965).....	22, 23, 24, 35
Ballwanz v. Isthmian Lines, Inc. (4th Cir., 1963) 319 F. 2d 457	32, 35
Bryant v. Partenreederei-Ernest Russ (1964) 330 F. 2d 185	20, 32
Cox v. Esso Shipping Co. (5th Cir., 1957) 247 F. 2d 629....	33
Darlington v. National Bulk Carriers (2nd Cir., 1946) 157 F. 2d 817	36, 37
Ferguson v. Moore-McCormack Lines, Inc. (1957) 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511.....	15, 34
Guzman v. Pichirilo (1962) 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205.....	13
Hilderbrand v. United States, 134 F. Supp. 514 (S.D.N.Y. 1954), aff'd 226 F. 2d 215 (2nd Cir., 1955).....	34
Hudson Waterways Corporation v. Schneider (9th Cir., 1966) 365 F. 2d 1012.....	33, 36
In re Imperial Irrigation District, 38 F. Supp. 770 (S.D., Calif., 1941), aff'd (9th Cir., 1943) 136 F. 2d 539, cert. den. 321 U.S. 787, 64 S. Ct. 784, 88 L. Ed. 1078 (1944)..<	14
Ktistakis v. United Cross Navigation Corp. (2nd Cir., 1963) 316 F. 2d 869.....	26
McAllister v. United States (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.....	13, 28
Michalie v. Cleveland Tankers, Inc. (1960) 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.....	33
Palermo v. Luckenbach S.S. Co. (1957) 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3.....	32

TABLE OF AUTHORITIES CITED

iii

Page

Rodriguez v. Coastal Ship Corp., 210 F. Supp. 38 (S.D.N.Y., 1962)	20
Rogers v. Missouri Pacific Railroad Co. (1957) 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493.....	15
San Pedro Compania Armadoras, S.A. v. Yannacopoulos, 357 F. 2d 737 (5th Cir., 1966).....	34
Sentilles v. Inter-Caribbean Shipping Corp. (1959) 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142.....	15
Sizemore v. United States Lines Co., 213 F. Supp. 76 (E.D. Pa., 1962), aff'd, 323 F. 2d 774 (3rd Cir., 1963).....	35
Smith v. The United States (4th Cir., 1964) 336 F. 2d 165	33
Socony-Vacuum Oil Co. v. Smith (1939) 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265.....	32
Street v. Isthmian Lines, Inc. (2nd Cir., 1963) 313 F. 2d 35	34
Waldron v. Moore-McCormack Lines, Inc. (2nd Cir., 1965) 356 F. 2d 247.....	24

No. 21,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD., a corporation, <i>Appellant and Cross-Appellee,</i> vs. E. B. WELCH, <i>Appellee and Cross-Appellant.</i>	}
--	---

**Appeal and Cross-Appeal from an Admiralty Decree
of the United States District Court for the
Northern District of California
Honorable Bruce R. Thompson, District Judge**

BRIEF FOR APPELLEE AND CROSS-APPELLANT

JURISDICTION

This Court has jurisdiction in this case on the basis of the facts and authorities cited in Appellant's Opening Brief.

INTRODUCTION

Appellee, E. B. Welch, a marine engineer, suffered permanent back injuries aboard appellant's ship in the course of dismantling and carrying heavy parts

of a disabled standby lube oil pump to the ship's machine shop for necessary repairs. Appellee was acting under direct orders of his superior officer while performing this work. The assigned task was rated as a two-man job. The extra man required for such work was normally provided *without request* and a helper was in fact initially furnished to work with appellee on this job. The helper's normal work day ended at noon and he left the job before it was finished. No substitute was furnished appellee to complete the task. Appellee however, in obedience to his orders, continued to do the required work alone. He sustained injury while carrying the several heavy parts of the pump (metal pistons weighing 100 lbs. each and a metal crosshead which weighed over 40 lbs.) by reason of the shipowner's failure to provide the additional man on the required job.¹

The District Court found the shipowner liable and assessed damages for appellee's injuries in the total sum of \$38,450.00 (Finding No. 19, R. I, 46; Conclusion No. 3, R. I, 47); the Court also found that appellee's own negligence contributed 50% to the accident (Finding No. 20, R. I, 47; Conclusion No. 4, R. I, 47). A final decree in Mr. Welch's favor was entered

¹The record in this case consists of 3 volumes and various exhibits. References to the numbered volumes are by volume and page, e.g. (R. I, 17). Two depositions, those of Pak and Goodheim, were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g. (Pak 33). All other exhibits are referred to by their original designations, e.g. (Resp. Exh. B).

for \$19,225.00 upon findings of unseaworthiness of appellant's vessel based on the shipowner's failure to provide sufficient men for the assigned task. The nature and extent of Mr. Welch's injuries and the amount of the award is not challenged by the appellant.

The shipowner seeks reversal of the decree contending: (1) the Court erred in finding that "carrying the crosshead" (a part of the disabled pump) was rated as a two-man job (Appellant's Opening Brief p. 5); and, (2) the Court erred in holding the vessel unseaworthy for its failure to provide two men to carry such crosshead about the ship.

The injured seaman cross-appeals and seeks reversal of that part of the decree which reduced his damages on the basis of contributory fault, urging: (1) there was no evidence to support the finding of contributory negligence; (2) obedience to orders of his superior officers aboard ship cannot constitute contributory negligence; and, (3) the Court erred in reducing damages by 50% based upon an erroneous finding of contributory negligence.

The following factual summary and appellee's argument will demonstrate that the findings of unseaworthiness are based upon substantial evidence, entirely consistent with applicable principles of maritime law; and further that the District Court erred in reducing damages by finding contributory negligence on appellee's part. The Court's Findings and Conclusions of Law and the Final Decree are included in the Appendix to this Brief.

**STATEMENT OF FACTS RELATING TO THE ISSUES OF
UNSEAWORTHINESS AND CONTRIBUTORY NEGLIGENCE**

Appellee, E. B. Welch, a married man 64 years of age has been a licensed marine engineer for the past twenty years (R. II, 5). He holds a third assistant engineer's license for diesel ships and a chief engineer's license for steam vessels (R. II, 5). About fifteen of his twenty years at sea were devoted to the service of the appellant steamship company (R. II, 5). Prior to injury, the employer admittedly had high regard for appellee's capabilities as a marine engineering officer (R. III, 5).

The accident occurred on the afternoon of February 19, 1964 while appellee was employed as a third assistant engineer aboard appellant's passenger ship, the SS. PRESIDENT ROOSEVELT (R. II, 5, 12, 51). En route to Los Angeles from San Francisco, it was observed that the standby lube oil pump in the forward engine room of the vessel was pounding (R. II, 13). The function of this pump is to cut in when one of the regular lube oil pumps supplying lubrication oil for the main turbines fails (Goodheim 31). Upon arrival at Los Angeles, the vessel could not safely proceed to sea without first repairing this standby pump (R. II, 14; Goodheim 33). The vessel was regularly scheduled to sail from Los Angeles the next day, February 20, 1964 (Goodheim 32).

On the morning of February 19th, the ship's First Assistant Engineer, Mr. Frank Pak, who was appellee's superior officer, ordered Mr. Welch to dismantle the pump and make the necessary repairs (R. II, 12;

Pak 5). The pump was located in the forward engine room on the starboard side, aft (R. II, 12, 59). The vessel had two engine rooms, one forward and one aft (R. II, 69). On the day involved, the forward engine room was under the supervision of Mr. James Goodheim, the second assistant engineer, who was Mr. Welch's immediate superior and the watch officer there in charge (R. II, 13; Goodheim 25).

During the morning of February 19th, an oiler was assigned to assist appellee with the required work on the standby pump (R. II, 16). The oiler was on the 8-12 watch, which meant that his working hours were from 8:00 a.m. to 12:00 noon, and from 8:00 p.m. to 12:00 midnight (R. II, 16). With the assistance of the oiler, appellee dismantled the pump to the extent of exposing the parts for repair (R. II, 63). Appellee and the oiler then removed the two pistons and the crosshead from the pump housing (R. II, 63). About noon, the oiler left the engine room after having completed his "watch" (R. II, 16, 17). Appellee returned from lunch about 12:30 p.m. (R. II, 5-6), and found himself without assistance (R. II, 17). At this point in the repair procedure, it was necessary to take each of the two pistons and the crosshead to the machine shop of the vessel (R. II, 17). The pistons consist of long steel rods with metal cylinders at one end about fourteen inches in diameter and six inches thick (R. II, 14). It is undisputed that each piston weighs in excess of one hundred pounds (R. II, 14; Goodheim 5). The crosshead, which holds the pistons in a rigid position inside the pump, is a two-piece metal casting

secured together by four studs, 6 to 8 inches square, and weighs 42 pounds (R. II, 14, 15, 61; R. III, 7).

Although both the First Assistant Pak and the Second Assistant Goodheim were aware that carrying the pistons and crosshead to the machine shop was a two-man job, a substitute helper was not assigned to assist Mr. Welch in the afternoon to complete the required task (Pak 9, 10; Goodheim 5, 6). Both Pak and Goodheim had authority to call out additional men but were unable or neglected to do so (Pak 10). Mr. Goodheim was in the forward engine room within fifteen feet of Mr. Welch and observed him in the afternoon working alone on the standby lube oil pump, but he himself could not lend Mr. Welch a hand because he was engaged in necessary repairs on another one of the vessel's pumps (the coffin feed pump) (Goodheim 9, 15). There was of course also a fireman on watch in the forward engine room but he could not be spared to assist Mr. Welch because he had the duty of tending the boilers (Goodheim 15). All additional members of the engine room crew who were on duty at that time were working on the boilers in the after engine room, which had been shut down or secured because of their malfunctioning (Pak 9; Goodheim 8, 15). There was *no* help available to Mr. Welch (Goodheim 8). Nor did Mr. Welch, in his capacity as Third Assistant Engineer, have authority to call any men out himself (Pak 16; R. II, 20). Moreover, the engine storekeeper who had been delegated authority to call out wipers (maintenance men) as helpers, was not in his storeroom, the door of which was padlocked at the time (R. II, 90).

Lacking assistance, Mr. Welch proceeded to carry out his orders to repair the standby lube oil pump alone (R. II, 96). Appellee picked up the first piston from the floor plates near the lube oil pump, and carried it up a ladder of approximately ten rungs by taking it up one step at a time; he then lifted it over a six to eight inch coaming, proceeded through a watertight door, and carried the piston for several more feet to the machinery space (R. II, 97). Mr. Welch then checked the nuts for tightness and the condition of the piston rings. Appellee, finding nothing wrong with this piston, carried it back down to the floor plates by the same route. Mr. Welch then repeated the same procedure with the second piston (R. II, 98, 99). He made a total of four trips up and down the ladders and over the coamings with these heavy parts of the pump. At the conclusion of lifting and carrying the pistons to and from the machinery space, appellee's back felt "tight" (R. II, 99).

After setting down the second piston, appellee picked up the metal crosshead (R. II, 99). Although the crosshead is composed of two separate halves, the studs or bolts which held it together were "battered", and appellee could not unscrew the corresponding nuts without the aid of a vise (R. II, 16, 93; Goodheim 7). There was no vise in the forward engine room (Goodheim 7). It therefore was necessary for appellee to carry the entire crosshead to the machine shop where an appropriate vise was located. The ship's machine shop was further distant than the machinery repair space where he had examined the pistons. Thus, in

addition to climbing the ten rungs of the engine room ladder, and clearing the coaming of the watertight door, with the crosshead, it was necessary to carry this unwieldy metal part about twenty-five feet more through the repair space between the forward and after engine rooms, thence up over another six to eight inch coaming through a second watertight door and then over another ten foot space into the machine shop (R. II, 17-18).

When appellee reached the first watertight door, carrying the crosshead, he heard and felt a "pop" in his lower back (R. II, 21, 22). He set the crosshead down on a bench, straightened himself out, and continued to the machine shop with the crosshead (R. II, 22). At the machine shop, Mr. Welch placed the crosshead in a vise, removed the studs or bolts, so that the machinist could reface it (R. II, 22).

Appellee thereupon left the machine shop and went directly to the forward engine room where he reported his injury to his immediate superior, the Second Assistant Engineer (R. II, 23). Mr. Goodheim told him to "knock off" and he went to his quarters (R. II, 23, 24). Mr. Welch also reported the accident to Mr. Pak, the First Assistant Engineer, who told him to take the rest of the day off (R. II, 24). Appellee was confined to his quarters with pain and numbness in his right hip and leg until the vessel reached Honolulu, about five days after his injuries (R. II, 25, 31). During this time, he received some medical attention from the ship's surgeon, Dr. McLennan (R. II, 31). When the vessel berthed at

Honolulu, Mr. Welch was in great pain; he was given a hospital slip, and reported to the United States Public Health Service Hospital (R. II, 32).

After examination at the Honolulu facility of the Public Health Service Hospital, Mr. Welch was declared "not fit for duty" (R. II, 32). Although in severe pain, he was required to return to his ship and wait there until an airplane ticket was obtained for him (R. II, 36). Appellee then had to walk back to the inshore side of the dock, and was taken by cab to the airport (R. II, 37). A porter placed him in a wheelchair and Mr. Welch was wheeled to the plane (R. II, 37). There were no representatives when he arrived (R. II, 37). It wasn't until the following day that appellee was admitted to the United States Public Health Service Hospital at San Francisco (R. II, 38). Mr. Welch was kept in a traction device for about fifteen days (R. II, 39). After his discharge as a bed patient he continued treatment at the same hospital facility on an out-patient basis (R. II, 41). Appellee was made permanently not fit for duty on October 5, 1964 (R. II, 41), and is unable to return to sea (R. II, 44). The pain in appellee's right leg and hip is of a permanent nature; he is unable to lift, bend or walk more than a short distance without sitting down and resting (R. II, 44).

As a result of the accident and Mr. Welch's resultant injuries, the District Court found the shipowner liable and assessed damages of \$38,450.00 which were reduced by 50% on the basis of a finding of contributory negligence on appellee's part. A final decree

was therefore made and entered in favor of Mr. Welch in the sum of \$19,225.00 (Findings Nos. 19-21, R. I, 46-47). The shipowner does not challenge the nature and extent of Welch's resulting disability or the amount of the award. Appellee on his cross-appeal, contends that the finding of contributory negligence was error and the total award of damages should not have been reduced in the decree (Findings Nos. 20, 21, R. I, 47).

SPECIFICATION OF ERRORS ON CROSS-APPEAL

Cross-appellant specifies the following errors upon which he relies for reversal of that portion of the decree relating to the issue of contributory negligence:

1. The District Court's Finding No. 20 (R. I, 47) is clearly erroneous in stating that libelant was guilty of contributory negligence for his failure to request additional help to aid him in his assigned task, since there was no evidence that additional help was available at the time. Knowledge on the part of the shipowner of the unsafe working condition is irrelevant to liability on the ground of unseaworthiness of the vessel for dereliction of the shipowner's non-delegable and continuing duty to provide at hand two men for a two-man job.

2. Obedience to orders of superior officers aboard ship cannot constitute contributory negligence where there was no safe alternative provided by the shipowner at hand.

3. The District Court erred in finding and holding (Findings Nos. 20, 21, R. I, 47; Conclusions No. 4, 5, R. I, 47-48) that the injured seaman's damages should be reduced by 50% based upon an erroneous finding of contributory negligence, since there was no evidence that appellee was negligent and/or that any want of ordinary care on the seaman's part directly contributed to the accident for which damages are sought.

SUMMARY OF ARGUMENT

On the Appeal.

1. Substantial evidence supports the District Court's Findings that the failure of appellant to provide appellee with sufficient help for the required task rendered the vessel unseaworthy.

2. Where appropriate findings of essential facts are made which decide or dispose of the issues presented, the trial court is not required to make additional findings on peripheral matters.

3. The rule with regard to proof of causation in seamen's cases differs from that applied at common law. It is sufficient to show that the shipowner's dereliction of duty (unseaworthiness) contributed in whole or in part to the injury for which damages are sought. The unseaworthy condition *need not be a proximate cause* of the accident for liability to attach.

4. The shipowner's failure to provide sufficient men at hand for an assigned task *on a fully manned ship* renders the vessel unseaworthy.

On the Cross-Appeal.

1. The shipowner has an *absolute, continuing and non-delegable* duty to provide sufficient men at hand for the required task. This duty of the employer cannot be shifted to the employee under the guise of contributory negligence.

2. There is no evidence in the record to support the finding that appellee was guilty of contributory negligence because of his failure to request assistance. Proof that additional help was available at hand to aid appellee in the required task is an indispensable predicate for such finding of contributory negligence. Appellant failed in its burden of proof on this issue.

3. Total lack of evidence on the availability of help at hand for the assigned task, requires reversal of the District Court's holding of contributory negligence, since appellant has failed to prove the causal connection between appellee's conduct and the resultant injuries. Before damages may be reduced, negligence of the injured seaman, if any, must be shown to have *directly contributed* to the accidental occurrence.

4. Appellee suffered his injuries for lack of help in the course of his assigned task while acting under direct orders of his superior officers. Faithful performance of orders aboard ship cannot be made a basis for contributory negligence, particularly where appellant had the *continuing, non-delegable* duty to provide the assistance *at hand*.

ARGUMENT ON THE APPEAL

I. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT THE FAILURE OF APPELLANT TO PROVIDE APPELLEE WITH SUFFICIENT HELP FOR THE REQUIRED TASK RENDERED THE VESSEL UNSEAWORTHY.

A. Trial Court's Finding on the Factual Issue of Unseaworthiness Are Conclusive Unless "Clearly Erroneous".

The rules relating to appellate review in an admiralty case are well defined and need no extensive elaboration. Appellant, in its brief, however, has chosen to select portions of the record out of context in an attempt to support its position. For this reason, a brief summary of the established rules are in order.

"In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. [citing authorities]. A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' [citing authorities]."

(*McAllister v. United States* (1954) 348 U.S.
19, 20, 75 S. Ct. 6, 99 L. Ed. 20.)

See also:

Guzman v. Pichirilo (1962) 369 U.S. 698, 702,
82 S. Ct. 1095, 8 L. Ed. 2d 205.

Appellant also challenges the District Court's findings with the assertion that the Court failed to men-

tion several factors that appellant deems important (Appellant's Opening Brief, p. 6). Prior to examining this challenge for merit, it appears of record that appellant made no request in the Court below for additional findings on any or all, save one, of those "factors" which appellant now claims are important omissions of the trial Judge (Respondent's Objections to Proposed Findings, R. I, 56). Moreover, examination of these "factors" reveal them to be of the most peripheral nature. Where appropriate findings of essential facts are made by the trial Court which decide or dispose of the issues presented, additional findings are not required.

See:

In re Imperial Irrigation District, 38 F. Supp. 770, 772 (S.D., Calif. 1941), *aff'd* (9th Cir., 1943) 136 F. 2d 539, *cert. den.* 321 U.S. 787, 64 S. Ct. 784, 88 L. Ed. 1078 (1944), holding:

"... The court need not find on every issue requested, but a finding of such essential facts as lay a basis for the decision is sufficient [citing cases]. . . . Clearly the rule does not require the court to make elaborate findings upon facts which are inappropriate to the decree entered, nor upon all such facts as will fully present every possible view of the case."

In this context, appellant asserts at page 7 of its brief that "If the plaintiff proves that a vessel is unseaworthy, he must also prove that the unseaworthiness *proximately* caused the injury" (Emphasis added).

Such assertion is not the maritime law.

The causal connection between unseaworthiness and injury need not be "proximate" or "a proximate cause" for liability to attach. With regard to proof of causation in seamen's cases, the rule differs from that applied at common law. In seamen's cases (and in Federal Employee's Liability Act cases) the Supreme Court holds that "the test is simply whether the proofs justify with reason the conclusion that negligence of the employer, or any unseaworthy condition of the ship *played any part, even the slightest*, in producing the injury for which damages are sought".

See:

Ferguson v. Moore-McCormack Lines, Inc.
(1957) 352 U.S. 521, 523, 77 S. Ct. 457, 1 L. Ed. 2d 511;

Sentilles v. Inter-Caribbean Shipping Corp.
(1959) 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142;

Rogers v. Missouri Pacific Railroad Co. (1957)
352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493.

B. The Finding That Appellant's Failure to Provide Appellee With Sufficient Help for the Required Task Is Amply Supported by the Record.

The main thrust of appellant's argument is that there is no evidence in the record that carrying a 42-pound crosshead was rated aboard the vessel as a two-man job (Appellant's Opening Brief, p. 8). Initially, appellant fails to correctly state the substance of the

Court's findings on this issue. The precise findings of the trial judge on this subject were as follows:

"6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help libelant with dismantling the pump on the morning of the date of the accident, but the oilers time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone." (Finding No. 6, R. I, 43).

It is manifest from the foregoing language that the court found that the *entire task* (dismantling the pump and carrying the pistons and the crosshead to the repair space) was rated as a two-man job. The court did not limit its findings to the carrying of any one particular part, but also found that "... each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons on the pump) are of considerable weight" (Finding No. 5, R. I, 42-43). Consequently, appellant's failure to assign an additional man to assist appellee in dismantling the pump *and* transporting its parts to the machine space for repair rendered the vessel unseaworthy (Finding No. 8, R. I, 44).

The reasons why the required work was rated as a two-man job seem obvious in the light of the foreseeable circumstances. Even without resort to permissible inference, the court could conclude that not

only was the strength and agility of more than one man required to lift and aid or spell each other in carrying the heavy parts about the ship, but time-wise, profit-wise and with due regard for the safety of its employees, two men were necessary to safely accomplish the assigned task.

The record discloses that appellee felt a “pop” in his back while carrying the crosshead. He also testified that immediately prior to handling the crosshead, he made four trips up and down the steep engine room ladder over the coaming of the watertight door to the machine space and felt a tightness in his back (R. II, 97-99). Significantly, no evidence was offered by appellant to contradict the fact that *each* piston weighed in excess of 100 pounds (R. II, 14). Appellee’s testimony in this regard was as follows:

“Q. After you put it back down—how did your back feel at that time, having lifted and carried each of these pistons up and down?

A. I would say it felt tight. It was a pretty heavy lift.

Q. Now, the next thing that you did after you had set it down, that is the second piston, was when you picked up the crosshead?

A. Right.” (R. II, 99.)

Although it is axiomatic that the District Court is the proper judge of the credibility of witnesses, it should be noted, despite appellant’s implication to the contrary (Appellant’s Opening Brief, pp. 8-9, n. 2), appellee’s testimony concerning the tightness in his back occasioned by carrying the pistons was presented

prior to the evidence by appellant that the crosshead weighed 42 lbs.

The court's finding that the carrying of the pistons and the crosshead was rated aboard the vessel as a two-man job has ample support in the record. Appellee's superior officer, Mr. Pak, a Marine Engineering Officer with twenty years of experience, and the First Assistant Engineer aboard the ship testified as follows:

"Q. How many men are required in normal, customary, usual practice to lift out each one of those pistons from the pump?

A. Well, normally we have two or three men on a job like that.

Q. And carrying each one of those pistons, or the crosshead, up to the machine shop, how many men are usually required to do that manually?

A. Two or three men" (Pak 9).

Upon direct examination after proper foundation had been laid, appellee gave the following testimony:

"Q. Now, then, getting back to this particular pump. I take it, Mr. Welch, that lifting the piston out of the pump is a two-man job?

A. Right.

Q. Carrying each piston from the pump to the machine shop is a two-man job?

A. Yes.

Q. Lifting the crosshead out of the pump is a two-man job?

A. Yes.

Q. Carrying the crosshead from the pump to the machine shop is a two-man job?

A. Right" (R. II, 20).

At no time during the trial, did appellant offer a scintilla of evidence in conflict with either the testimony of Mr. Pak or appellee that carrying such parts from the disabled pump to the machine space is rated as a two-man job (Transcript of District Court's Concluding Remarks 3).

The trial court was not required to make its findings in a vacuum without regard to the realities revealed by the evidence. Findings of fact are properly made in the light of all the circumstances disclosed by the proofs and often the surrounding circumstances are of equal importance with the isolated event.

Appellant's insistence that the trial court must isolate the proverbial straw which breaks the camel's back in a situation where a seaman is injured through the dereliction of the shipowner's duty in failing to provide sufficient men for an assigned task, is indeed a strained construction of reality.

Appellee cannot improve upon the comments of the District Judge in disposing of appellant's contention in this regard, which were as follows:

"I think it is also very clear from the evidence that Mr. Welch did suffer an injury while dismantling the pump and carrying the parts about in the course of this repair.

"I don't know that it is important to determine just what point, or on what step of the ladder, for example, the critical injury occurred, but the Court finds that the preponderance of the evidence shows that it occurred while he was carry-

ing the crosshead, Exhibit C, which although not as heavy as the witnesses for the libelant would want everyone to believe, it was nevertheless a substantially heavy item to carry up what amounts to a ladder, that is, a steep staircase. How heavy something is depends a lot upon the circumstances under which it is being handled, and the Court believes that this was a substantially heavy item to be handled by one man under those circumstances" (Transcript of District Court's Concluding Remarks 4).

The District Court correctly noted that all the circumstances are to be considered in determining whether unseaworthiness exists in a given case.

See: *Rodriguez v. Coastal Ship Corp.*, 210 F. Supp. 38, 43 (S.D. N.Y., 1962) holding:

"What an industry does or fails to do, while it may have some evidential value, does not establish or diminish the measure of legal duty—an absolute one to supply a seaworthy vessel. Whether or not the shipowner has measured up to that duty is determined by the trier of the fact upon *all* the evidence in a given case and not by the standard set by industry practice." (Emphasis added)²

This same principle was discussed and followed by the Fourth Circuit in *Bryant v. Partenreederei-Ernest Russ* (1964) 330 F. 2d 185. In that case, the shipowner argued that the tactics which occasioned

²The *Rodriguez* case, *supra*, was recently cited with approval by the Court of Appeals for the Ninth Circuit in *Hudson Waterways Corporation v. Schneider*, 365 F. 2d 1012 at page 1015.

the accident were encompassed in the usual work regularly done by ship ceilers and which they were hired for and expected to do. Although the court recognized that the workman was hurt while engaged in a customary activity, it rejected the shipowner's argument with the following observation at page 189:

" . . . We feel, however, that it would be unjust to say that when these tactics lead to injury . . . the shipowner may escape liability by pleading that the worker was doing that which he was required to do. Where a shipowner fails to abide by his duty to furnish his workers with safe appliances and a safe place in which to work, he must face the resulting consequences. He may call the tune, but he also must pay the piper. *Seas Shipping Co. v. Sicrachi*, supra; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944).

"Additionally, we think that the trial court attempted to limit the standard of reasonable fitness by erroneously interpreting it to mean fitness as determined by prevailing customs of the trade It is an established principle, however, that in negligence actions under the Jones Act, prevailing trade customs cannot furnish the legal standard of due care. [Citing cases.] This being true, we fail to perceive any logical reason why trade customs should be permitted to form the legal standard of seaworthiness in actions under the general maritime law."

The record here amply supports the trial court's findings that the job of dismantling the standby pump, and carrying its separate parts to the machine

shop was rated aboard the vessel as a two-man job and in fact, required the strength and agility of two men to safely complete such task. Appellee's proofs were also more than sufficient to satisfy the applicable legal standard of causation in that reason justifies the trial court's finding that the shipowner's dereliction of duty (the unseaworthiness of the ship) played a significant part in producing the injury for which damages were awarded.

II. THE DISTRICT COURT APPLIED CORRECT LEGAL STANDARD IN FINDING THE VESSEL UNSEAWORTHY.

The District Court found the vessel unseaworthy by reason of its failure to provide libelant with sufficient men for the task assigned to him (Finding No. 8, R. I, 44). Appellant argues that the Court applied an incorrect legal standard in determining unseaworthiness; it urges that the test should be the sufficiency of the crew as a whole rather than assigning sufficient men required for a particular task (Appellant's Opening Brief p. 10). This is hardly a fresh argument. Indeed the same shipowner who appeals here has previously and unsuccessfully made the identical argument to this Court.

In *American President Lines, Ltd. v. Redfern*, 345 F. 2d 629 (9th Cir., 1965) where the issue was whether freeing a stuck sea valve was a two-man job *on an admittedly fully manned ship*, this Honorable Court's holding then, equally applicable now, was as follows:

“A stuck sea valve, the trial judge found—and the finding is supported by substantial evidence—is suitable only if operated by two men; otherwise, it constitutes a dangerous condition. Nor was such an occurrence so unexpected or isolated as to be ‘completely unforeseeable’ as in *Morales v. City of Galveston*, 370 U.S. 165, 171, 82 S. Ct. 1226, 8 L. Ed. 2d 412 (1962), and hence not a peril to be guarded against; here, the evidence was all to the effect that on shipboard all valves have a tendency to stick on occasion, due to temperature changes, the manner of their construction and various other factors. In this setting, we are satisfied that the court was justified in determining that the HOOVER was not reasonably fit for service because she was improperly manned—‘a classic case of an unseaworthy vessel’. *June T., Inc. v. King*, 290 F. 2d 404, 407 (5th Cir. 1961).” (345 F. 2d, at 631-32).

In *Redfern*, *supra*, one could not predict whether the sea valve was stuck until at least one attempt to free it had been made. In the instant case, it was clearly foreseeable that both pistons and the crosshead from the disabled pump would have to be carried to the machine space for inspection and repair. Indeed, it is undisputed that two men were in fact assigned for the initial dismantling of the pump (which merely required removing the pistons and crosshead from the pump). It follows that lifting and transporting these heavy parts of the pump up a steep ladder and through water-tight doors required at least the agility and strength of an equal number of men.

Moreover, the “dangerous condition” referred to in the *Redfern* case, *supra*, was the danger which existed when one man attempted to operate the valve alone. The Court in *Redfern* did not hold, as appellant suggests in its Brief, that the valve (or here the piston and crosshead) was dangerous in itself. “The valve could not be separated from its surroundings and viewed separately without unduly distorting its significance.” (345 F. 2d at 631).

Appellant cites the case of *Waldron v. Moore McCormack Lines, Inc.* (2nd Cir., 1965) 356 F. 2d 247; appellee recognizes that certain language in the *Waldron* opinion is in apparent conflict with the decision of this Court in *Redfern*, *supra*, and also conflicts with other well established principles of maritime law. Appellee respectfully refers this Court to the able dissent of Judge J. Joseph Smith in the *Waldron* case and further notes that the Supreme Court has granted certiorari in *Waldron* (35 U.S. Law Week 3124).

The *Waldron* case, however, does not disapprove of the holding in *Redfern*—even though appellant does suggest otherwise. In *Waldron*, *supra*, the Court states the following:

“... Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. *Crumady v. Joachim Hendrick Fisser*, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413. So also with a stuck valve that could only be ‘broken’ by the use of tools or several men working together. *American President Lines, Ltd. v.*

Redfern, 9 Cir., 1965, 345 F. 2d 629." (Emphasis added) (356 F. 2d, at 250).

Appellant raises one further point with respect to an application of law by the trial judge. Appellant intimates that the trial judge 'erroneously' applied the same rule of law in this case as he 'erroneously' applied in the case of *Victory Carriers, Inc. v. Guiton*, No. 20,405 (9th Cir.). We hesitate to comment on unreported excerpts from a record on appeal in another case nor do we see the relevance of the quoted language from the *Guiton* case which we understood from Appellant's Brief dated November 25, 1966, is presently on appeal.

The records of the Court of Appeals for the Ninth Circuit, however, reveal that the appeal in the *Guiton* case, *supra*, was dismissed by stipulation of the proctors for the respective parties (including proctors for the appellant here) on September 13 and September 20, 1966.

Under these circumstances, by application of the principles of stare decisis, the case of *Victory Carriers v. Guiton*, No. 28,640 (N.D. Calif.) becomes persuasive authority in favor of appellee.

ARGUMENT ON CROSS-APPEAL**I. THE DISTRICT COURT'S FINDINGS THAT APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IS UNSUPPORTED BY THE RECORD AND IS CLEARLY ERRONEOUS.**

The District Court found that "libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964." (Finding No. 20, R. I, 7) Examination of all the Findings and the entire record reveals that this is the sole basis for the Court's reduction of libelant's damages by fifty (50%) percent.

There is no evidence and no basis in law for the Court's determination that appellee was guilty of contributory negligence in the situation presented to the trial court. The District Court's finding that appellee was guilty of contributory negligence is also inconsistent with the trial court's other findings on liability which are unchallenged by appellee.

In order to sustain a determination of contributory negligence, the District Court must find that appellee failed to act as a reasonably prudent man would under similar circumstances. As Judge Marshall stated in the *Ktistakis v. United Cross Navigation Corp.* (2nd Cir. 1963) 316 F. 2d 869, 870-71:

"... In considering whether plaintiff has been contributorily negligent, the District Court should have judged plaintiff's conduct by the traditional negligent standard of whether he exercised the care which a reasonably prudent man would have exercised under the similar circumstances. *Dixon v. United States*, 219 F. 2d 10, 16-17 (2nd Cir.

1955). Because the District Court failed to use this standard, the finding that plaintiff was contributorily negligent is reversed.”

Any inquiry on this subject, therefore, must initially consider the particulars and surrounding circumstances upon which the District Court found appellee to have acted below the reasonable man standard. And secondly, whether want of ordinary care on appellee’s part *directly* contributed to the accident for which damages are sought.

The following facts as found by the District Court are a necessary predicate in considering the points raised on the cross-appeal:

Appellee commenced to dismantle the standby oil lube service pump located in the forward, lower engine room and to make the necessary repairs thereto on the morning of February 19, 1964 “upon orders of his superior officer” (Finding No. 5, R. I, 42-43). The repairs on the malfunctioning pump were required since “. . . the ship could not safely go to sea unless this standby pump was in operating condition” (Finding No. 5, *supra*). This repair necessitated carrying two pistons and a crosshead, each of “considerable weight” up from the forward engine room to the ship’s machine shop (Finding No. 5, *supra*). The job of dismantling the pump and carrying its parts to the ship’s machine shop was rated as a two-man job (Finding No. 6, R. I, 43). An oiler had been assigned on the morning of February 19th, but the oiler’s time was up at noon and he went off duty (Finding No. 6, *supra*). Appellee was not provided with a substitute

helper and had to transport the parts up to the machine shop alone (Finding No. 6, *supra*). In the course of carrying these parts, appellee was injured (Finding No. 7, R. I, 43-44). The failure of appellant to provide appellee with sufficient men rendered the ship unseaworthy (Finding No. 8, R. I, 44). Thereupon, the District Court found appellee contributorily negligent for failure to request additional help of his superiors (Finding No. 20, R. I, 47; Conclusion 4, R. I, 47).

Appellee contends that in this posture, the evidence cannot support a determination of contributory negligence and such finding is clearly erroneous.

See:

McAllister v. United States (1954) 348 U.S.
698, 702, 82 S. Ct. 6, 99 L. Ed. 20.

What the Court below did was to erroneously accept the shipowner's canard that 'if the injured seaman had requested help, the help would have been furnished'. Upon careful analysis, the shipowner's argument in this regard is without merit. It is merely a backdoor device which attempts to shift the shipowner's absolute, non-delegable and continuing duty (to at all times provide sufficient men for an assigned task) onto the injured seaman under the guise of contributory negligence and make him assume a risk of injury created solely through dereliction of duty on the shipowner's part. Moreover, the canard requires speculation and conjecture; it assumes the availability of additional help, available at hand.

Acceptance of the shipowner's canard also would shift the burden of proof which the shipowner normally has on the affirmative defense of contributory negligence, by assuming such availability of help at hand, without requiring the shipowner to prove such facts by a preponderance of the evidence. The canard also requires speculation, rather than proof from the shipowner, on the causal connection between the injured seaman's failure to make request for help and the direct contribution of such failure to the cause of the accident, where no other safe alternative is shown by the shipowner. Finally, if inquiry is made as to the function of such request which the shipowner would require of the injured seaman, one finds that it is for the purpose of notifying the shipowner of an unsafe working condition. Knowledge on the part of the employer of the lack of the assistance at hand (which is all the request would impart) is immaterial to liability under the doctrine of unseaworthiness. If the shipowner, *with or without knowledge*, refuses, neglects or is unable to supply the required help at hand, the injured seaman still has to obey the orders of his superior and finish the work. He surely should not be held guilty of contributory negligence where he lacks assistance which the employer failed to provide him with for the assigned task.

A. There Is No Evidence in the Record That Additional Help Was Available at Hand. There Is a Failure of Proof by the Shipowner on This Issue.

The finding that appellee was guilty of contributory negligence because he failed to request another as-

sistant when the initial helper left before the job was completed, must have as its evidentiary premise, that a substitute or other help was available at that time. The record, however, contains no such factual support. Indeed, there is substantial evidence to the contrary; that no additional available help was at hand. Furthermore, the shipowner had the burden of proof on this issue.

Mr. Goodheim, who was the engineer on watch in the forward engine room and who was appellee's immediate superior described the situation on the early afternoon of February 19, 1964 in the following words:

“Q. To your knowledge where were the other engineers and the other members of the unlicensed personnel (that is the black gang) at the time that Mr. Welch was carrying or transporting this particular crosshead up to the machine shop?

A. In the other engine room working on the boilers.

Q. To your knowledge what was the matter or condition of the boilers in the after engine room of the ship?

A. I believe they were leaking.

Q. Was that the situation in the early afternoon of February 19, 1964?

A. Yes sir.

Q. Was there any extra help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?

A. No sir.

Q. Where was the First Assistant Engineer, to your knowledge?

A. Back with the boilers, with the rest of the crew." (Goodheim, 7-8).

Moreover, the engine storekeeper who had authority to call out wipers (maintenance men) as helpers was not in his office, the door to which was padlocked at the time (R. II, 69). Mr. Pak, the First Assistant, who had primary authority to assign unlicensed personnel, was busy in the after engine room (Pak 10). Although Mr. Pak indicates it was his practice to assign men if requested, he fails to indicate whether a man was in fact available on that occasion (See Pak 10, 25-26). And appellee, himself, testified that he did not ask for help because "there was no one around." (R. II, 68).

The District Court is not permitted to base its finding of contributory negligence on conjecture concerning availability of crew members for assignment to aid Mr. Welch in the required task. This is especially true where all the evidence and all reasonable inferences from the evidence point to the opposite conclusion.

B. The Failure of the Injured Seaman to Request Additional Help Is Not Contributory Negligence.

Assuming for the sake of argument only, that additional help was available at the time, and further, that appellee failed to request such help, such failure in itself cannot support a finding of contributory negligence. A determination that the injured seaman is guilty of contributory negligence on that basis confuses contributory negligence with the doctrine of assumption of risk which has been rejected in maritime cases.

See:

Socony-Vacuum Oil Co. v. Smith (1939) 305

U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265;

Palermo v. Luckenbach S.S. Co. (1957) 355

U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3;

Bryant v. Partenreederei-Ernest Russ (4th Cir.

1964) 330 F. 2d 185, 189.

The applicable principle of law is set forth in *Ballwanz v. Isthmian Lines, Inc.* (4th Cir. 1963) 319 F. 2d 457 where it was contended that the plaintiff failed to complain or request other equipment. The court held:

“We also think it error for the Court to have charged the jury in this case that in considering the seaworthiness of the vessel they might take into consideration the plaintiff’s failure to complain or to demand additional material to make the equipment better suited for the purpose for which it was being used.

* * *

“The Courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of the ship his use of the latter will not relieve the owner of his responsibility. [citing cases] Certainly if a seaman may deliberately choose an unseaworthy part of a ship without losing his right of recovery then he is under no obligation to complain about his orders or to insist on better equipment.” (319 F. 2d 457, at 461-62.)

It was the duty of appellant to provide the assistance. Any attempt to shift this duty to appellee under the guise of contributory negligence or otherwise, is contrary to maritime law.

See:

Cox v. Esso Shipping Co. (5th Cir., 1957) 247 F. 2d 629, 636:

(“... The failure of the shipowner to comply with its heavy obligation to select and furnish seaworthy appliances cannot be thus turned into a fault by the seaman.”);

Smith v. The United States (4th Cir. 1964) 336 F. 2d 165;

Michalic v. Cleveland Tankers, Inc. (1960) 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

See also:

Hudson Waterways Corporation v. Schneider (9th Cir. 1966) 365 F. 2d 1012;

(A recent and excellent analysis by the Court of Appeals for the Ninth Circuit on the consequences to a merchant seaman where he fails to promptly obey the orders of his su-

periors aboard ship; and striking down an attempt by a shipowner to shift its duty to the injured seaman under the guise of contributory negligence.)

Indeed, even where a safe alternative is available, the courts have held that use of the defective apparatus does not constitute contributory negligence—or more precisely, one does not assume the risk of the unseaworthy condition.

See:

Hilderbrand v. United States, 134 F. Supp. 514, 517 (S.D.N.Y. 1954), aff'd 226 F. 2d 215 (2nd Cir. 1955);

San Pedro Compania Armadoras, S.A. v. Yannacopoulos, 357 F. 2d 737 (5th Cir. 1966).

Not only is it the ship's absolute, non-delegable and continuing duty (and not that of the seaman) to provide sufficient help for the required task, but the required help, particularly where the hazard is foreseeable, must continuously be provided *at hand*.

See:

Ferguson v. Moore-McCormack Lines, Inc. (1957) 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511;

Street v. Isthmian Lines, Inc. (2nd Cir. 1963) 313 F. 2d 35.

Furthermore, a failure to request assistance in itself does not satisfy the legal test of contributory negligence in maritime cases. The "negligence" of the

injured seaman must “contribute” to the accident. The standard of proof required is ably set forth in *Sizemore v. United States Lines Co.*, 213 F. Supp. 76 (E.D. Pa. 1962), *aff’d*, 323 F. 2d 774 (3rd Cir. 1963). After a review of the applicable case law, the court states the test as follows:

“ . . . A review of the common law indicates that plaintiff’s act or omission must at least *contribute directly* to his harm in order to constitute contributory negligence.” (213 F. Supp. at p. 83.)

In the *Sizemore* case, *supra*, the court further held that there can be no mitigation of damages where it is only shown that the act of the plaintiff merely “contributes in any part to the injuries”—the cause or relation must be instead “direct”. The test means more than an omission to request assistance, especially where there is no evidence that such assistance could have been provided at the time and where the duty of the shipowner to supply assistance was continuing, non-delegable and absolute.

See:

American President Lines, Ltd. v. Redfern (9th Cir. 1965) 345 F. 2d 629;

Ballwanz v. Isthmian Lines, Inc. (4th Cir. 1963) 319 F. 2d 457.

C. Injury Resulting From Obedience to Orders Cannot Be Contributory Negligence.

The record demonstrates and the findings confirm that appellee was acting under direct orders of his superior officer, the ship’s First Assistant Engineer,

in connection with the required task. He was told to dismantle and repair the disabled standby pump (Finding No. 5, R. I, 42-43; R. II, 12; Pak 5). The record also reveals that this job had to be completed with dispatch since the vessel could not safely sail unless this pump was in working order (Finding No. 5, *supra*; R. II, 14). It is not therefore an exaggeration to characterize the required task as urgent or in the nature of an emergency repair which was necessary for the well being and safe passage of the ship.

Under these circumstances, the only reasonable inference to be drawn from the evidence is that appellee sought to follow his orders and complete the job of repairing the pump as quickly and as best he could with the wherewithal and assistance provided him at hand. The damages caused appellee by his faithful performance of the orders of his superiors should not be reduced under these circumstances.

See:

Hudson Waterways Corporation v. Schneider
(9th Cir. 1966) 365 F. 2d 1012.

In *Darlington v. National Bulk Carriers* (2nd Cir. 1946) 157 F. 2d 817, the Court of Appeals approved the following instruction, which had been rejected by the District Court, and which accurately states the applicable law:

“ ‘the plaintiff was bound to obey the orders of his superiors on board the vessel. The Chief Officer was the plaintiff’s superior and plaintiff was bound to obey the orders of the Chief Officer. Even though the orders of the Chief Officer re-

quired him to work with unsafe tools or under unsafe conditions, the plaintiff was obliged to obey the orders and did not assume any risk of obedience to orders.'” (157 F. 2d at 819.)

In *Darlington*, supra, Judge Frank made the following observation: “the cases make it clear that the safety of ships at sea might be seriously endangered were the rule in accordance with the judge’s charge and not as stated in the requested charge” (157 F. 2d at 819).

See also:

Aivaliotis v. SS. Atlantic Glory (E.D. Va. 1963) 214 F. Supp. 568.

It is respectfully urged that appellee cannot be charged with contributory negligence for the faithful performance of the orders of his superior officer aboard ship. Such conduct on his part was at most an assumption of risk, which has no place in maritime law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on cross-appellant’s part and in that regard, the Decree should be set aside with directions to the court below to enter a new decree in the total amount of appellee’s and cross-appellant’s damages in the sum of Thirty-eight Thousand Four Hundred

Fifty (\$38,450.00) Dollars, with legal interest from November 24, 1965 and costs to the appellee and cross-appellant.

Dated, San Francisco, California,
January 20, 1967.

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
By MARTIN J. JARVIS,
Attorneys and Proctors for
Appellee and Cross-Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARTIN J. JARVIS,
Attorney and Proctor for
Appellee and Cross-Appellant.

(Appendix Follows)

Appendix

Appendix

Reference in Record

- A. Findings of Fact and Conclusions of Law
- B. Final Decree

R. I, 41-48

R. I, 49-50

A

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a seaman's action in admiralty for damages for personal injuries. The issues of maintenance and cure are not embraced within the pleadings. Therefore, they are not included herein. On the pleadings and the evidence, the Court hereby makes the following findings of fact:

FINDINGS OF FACTS

1. Libelant is E. B. Welch, a merchant seaman, now sixty-three years of age and a resident of the City and County of San Francisco, State of California. He has been a licensed Marine Engineer for over twenty years and has a high school education. Mr. Welch holds a Third Assistant Engineer's license for diesel vessels and a Chief Engineer's license for steam vessels.

2. Respondent is American President Lines, Ltd., a corporation, which has a principal place of business in the City and County of San Francisco, State of California.

3. Respondent owned, operated, managed, navigated, maintained and controlled the United States vessel, the SS. PRESIDENT ROOSEVELT, at all times mentioned herein.

4. From April, 1962 to the latter part of February, 1964, Libelant was employed by Respondent aboard

the SS. President Roosevelt as a Third Assistant Engineer. He served aboard said vessel on a series of voyages from San Francisco to the Far East and return to San Francisco. Libelant's immediate superior officers in the Engine Department of said vessel, at the time of his injuries in this case, were the Chief Engineer, Mr. Smith, the First Assistant Engineer, Mr. Pak, and the Second Assistant Engineer, Mr. Goodheim.

5. The accident to Libelant occurred in the early afternoon of February 19, 1964 on board the Respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day, during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly, and on the morning of February 19, 1964, the Libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs since the ship could not safely go to sea unless this standby pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across

an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight inch coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight.

6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.

7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting

and carrying the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

10. Libelant's injuries sustained in the accident aboard Respondent's ship on February 19, 1964 consisted of a lateral compression fracture of the body of his third lumbar vertebra with nerve root compression and irritation at that level of his spine, causing him much pain and resulting in weakness and atrophy of the musculature of his right leg. In addition, Libelant had a prior non-disabling and asymptomatic arthritic condition of his lumbar spine which was painfully aggravated and made symptomatic as a result of the injuries he sustained at work on February 19, 1964 aboard Respondent's ship.

11. Libelant received initial medical care and treatment for his injuries from the ship's doctor, and he was placed under medication for severe pain until

the vessel reached Honolulu on February 25, 1964. Libelant was there referred to the Public Health Service where he was examined and found to have an acute spinal injury and was repatriated by air to the United States Public Health Service Hospital facility at San Francisco for further care. The fractured vertebra was confirmed by X-ray and examination disclosed a nerve root compression in the lumbar spine, evidenced by painful limitation of back motion and weakness, atrophy, loss of sensation and impairment of the knee reflex in the right leg. Libelant was treated with pelvic traction, bed rest and medication at the San Francisco facility of the Public Health Service Hospital for about eighteen days. Thereafter he was continued as an out-patient at said hospital facility on a regimen of rest and limited activity with prescribed exercises and further medication for pain. Disability involving the back and the right leg persisted and Libelant was made permanently unfit for sea duty by the doctors at the United States Public Health Service Hospital on October 5, 1964. Libelant was treated thereafter at regular intervals as an out-patient at said hospital and also by a private physician, but there has been no change in his condition. Libelant's disabilities occasioned by the accident of February 19, 1964 consist of painful restriction of his back motion and weakness, atrophy and pain in his right leg. By reason of these disabilities, Libelant cannot engage in work requiring heavy lifting, prolonged standing, squatting or requiring the climbing of ladders or repetitive use of his right leg.

12. Since the accident, in an effort to keep working, Libelant has created a job for himself by the purchase of a jitney bus, and since April, 1965, has been operating said vehicle in San Francisco. He is able to work at his own pace and rest on the job since he is his own boss. He has averaged about \$200 net per month at this endeavor.

13. Libelant has a life expectancy of 13.8 years.

14. Libelant was earning and was capable of earning Ten Thousand Five Hundred Dollars (\$10,500) per year at the time of his accident aboard the SS. President Roosevelt.

15. Libelant sustained an actual loss of earnings and benefits as a result of said accident (with credit given for payment of unearned wages and credit given for actual earnings as a jitney operator) in the sum of Sixteen Thousand Two Hundred Dollars (\$16,200).

16. As a direct and proximate result of said accident, Libelant has sustained damages for past pain and suffering in the sum of Five Thousand Dollars (\$5,000).

17. As a direct and proximate result of said accident, Libelant has also sustained a permanent partial impairment of his earning capacity with a loss of future earnings. With respect to future earning capacity and by reason of Libelant's prior medical history including the arthritic condition of his back, it is reasonably probable that he could have worked an additional two and one-half years in his usual employment from and after age sixty-three. Accordingly, the

Court finds that Libelant has suffered damages for loss of future earnings in the sum of Fifteen Thousand Seven Hundred Fifty Dollars (\$15,750) based upon a partial loss of earning capacity on total annual earning power of Ten Thousand Five Hundred Dollars (\$10,500) per year for Libelant's work expectancy of 2.5 years, discounted to present value at 3.5% per annum.

18. With regard to future pain, suffering and discomfort as a result of said accident, Libelant has suffered damages in the additional sum of One Thousand Five Hundred Dollars (\$1,500).

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars (\$38,450) as a direct and proximate result of the accident suffered by him aboard the SS. President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars (\$19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the Respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars (\$19,225).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and of the parties.

2. Libelant's injuries and damages were proximately caused by the unseaworthiness of the Respondent's vessel, the SS. President Roosevelt, on the afternoon of February 19, 1964. See *American President Lines, Ltd. v. Redfern* (9 CCA 1965), 345 F. 2d 629; also *June T., Inc. v. King*, 290 F. 2d 404.

3. Libelant sustained total damages, before deduction for his own contributory negligence, in the sum of Thirty-Eight Thousand Four Hundred Fifty Dollars (\$38,450) as a direct and proximate result of the accident on board Respondent's ship, the SS. President Roosevelt, on the afternoon of February 19, 1964.

4. Libelant's own negligence contributed fifty per cent (50%) to the accident and consequences to Libelant.

5. Libelant is entitled to a Judgment and Final Decree for damages for personal injuries in his favor and against American President Lines, Ltd., a corporation, in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars (\$19,225), plus costs of suit, and with interest at the legal rate of seven per cent (7%) per annum from November 24, 1965.

Dated: November 24, 1965.

Bruce R. Thompson

United States District Judge

B

[Title of Court and Cause]

FINAL DECREE

The above entitled cause came on regularly for trial on November 1, 1965, in the above entitled Court before The Honorable Bruce R. Thompson, United States District Judge, sitting in Admiralty, the parties appearing in person or by their respective proctors; Messrs. Jarvis, Miller & Stender and Martin J. Jarvis, Esquire, appearing as proctors for the Libellant, E. B. Welch, and Messrs. Lillick, Geary, Wheat, Adams & Charles and Frederick W. Wentker, Jr., Esquire, appearing as proctors for Respondent, American President Lines, Ltd. The trial in the action commenced on the 1st day of November, 1965 and concluded on the 2nd day of November, 1965, and oral and documentary evidence having been introduced on behalf of the respective parties, and the Court having fully considered the facts and the law and the arguments of counsel, and having been fully advised, and the cause having been submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and good cause appearing therefor,

Now, Therefore, by reason of the law and the Findings of Fact aforesaid, It Is Ordered, Adjudged and Decreed:

That the Libellant, E. B. Welch, do have and recover of and from the Respondent, American Presi-

dent Lines, Ltd., a corporation, damages for personal injuries in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars (\$19,225), lawful money of the United States of America, with interest thereon at the rate of seven per cent (7%) per annum from November 24, 1965 until paid, together with Libelant's costs incurred in this action amounting to the sum of \$175.59, and that Libelant have execution therefor against Respondent unless this decree be satisfied within ten (10) days after entry of this decree and service of a copy of this decree on Respondent or its proctors.

Dated: November 24, 1965.

Bruce R. Thompson

United States District Judge

Original Filed November 26, 1965

Clerk, U. S. Dist. Court

21116 ✓

No. ~~2116~~

In the
United States Court of Appeals
For the Ninth Circuit

WALTER SELINGER,

Appellant,

vs.

LESTER BIGLER, Special Agent of the
Internal Revenue Service, and ROBERT
LANDESMAN, Internal Revenue Agent,

Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona

Reply Brief for Appellant

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

10th Floor - 111 West Monroe

Phoenix, Arizona

Attorneys for Appellant

FILED

FEB 24 1967

WM. B. LUCK, CLERK

FEB 29 1967

SUBJECT INDEX

	Page
Argument	1
I. The Inspection and Photocopying of the Taxpayer's Books and Records Violated the Taxpayer's Constitu- tional Rights Because He Was Not Informed of His Right to Counsel.....	1
II. Taxpayer Has the Right Under Arizona Law to Prevent the Government from Examining and Photocopying the Work Papers of His Accountant.....	4
Conclusion	5
Certificate	5

TABLE OF AUTHORITIES CITED

CASES	Pages
Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).....	5
Deck v. United States, 339 F.2d 739 (D. C. Cir. 1964).....	5
Escobedo v. Illinois, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977 (1964)	3, 4
In Re Fahey, 300 F.2d 383 (6th Cir. 1961).....	5
Miranda v. Arizona, 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed. 694 (1966)	2, 3
United States v. Ladner, 238 F.Supp. 895 (S.D. Miss. 1965)....	5

ARTICLE

Kamisar, "A Dissent From the Miranda Dissents", 65 Mich. Law Review 59, 66 (1966).....	3
--	---

STATUTE

Arizona Revised Statutes, Section 32-749.....	4
---	---

No. 2116

In the

United States Court of Appeals

For the Ninth Circuit

WALTER SELINGER,

Appellant,

VS.

LESTER BIGLER, Special Agent of the
Internal Revenue Service, and ROBERT
LANDESMAN, Internal Revenue Agent,

Appellees.

Upon Appeal from the District Court of the United States
for the District of Arizona

Reply Brief for Appellant

ARGUMENT

I. The Inspection and Photocopying of the Taxpayer's Books and Records Violated the Taxpayer's Constitutional Rights Because He Was Not Informed of His Right to Counsel.

Mr. Bigler admitted in his deposition that he did not advise Mr. Selinger that he had the right to counsel and the evidence is clear that he did not inform the taxpayer of the criminal nature of the investigation. (Bigler Deposition, Page 10) Since the taxpayer was not so informed of this right, and did not have advice of counsel, he did not intelligently waive his rights under the Fourth Amend-

ment when he allegedly consented to having the Revenue Agents examine his books and records.

If the rationale of *Miranda v. Arizona*, 384 U.S. 436 (1966) is to have any meaning at all in a tax fraud investigation, the taxpayer must be informed of his right to counsel whenever a Special Agent of the Internal Revenue Service enters the case. The critical time for the advice of an attorney is when a Special Agent interrogates a taxpayer and seeks permission to examine his books and records. (Br. 12) This is when the taxpayer most needs to be informed of the consequences of allowing a Special Agent to inspect and photocopy his records. After the books and records of a taxpayer have been examined by specially trained Revenue Agents, the evidence needed to convict the taxpayer will normally have been obtained. To inform the taxpayer of his right to counsel at some later time would be a useless gesture.

The crucial difference between a criminal tax investigation and other criminal investigations is that whenever a criminal tax investigation begins, there is always a suspect. On the other hand, in a normal criminal investigation, the investigation usually begins before a particular individual is suspected of the crime. If the rights given to an individual in *Miranda* do not apply in a criminal tax investigation until the government finds evidence that a crime has been committed, it is too late for the principals enunciated in *Miranda* to be effective, because once the evidence shows that a crime has been committed, it also establishes the guilt of the suspected taxpayer. In other words, in a general criminal investigation the police normally conduct a preliminary investigation before finding a suspect, whereas in a criminal tax investigation, when the investigation begins by the assignment of the

case to a Special Agent, there is, and remains, only one suspect.

Although the government argues that *Miranda* is limited to individuals in custody, the decision itself is not so limited. The Supreme Court indicated that an investigation is focused on an accused "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 16 L.Ed. 694 at 706.¹ The *Miranda* decision did not limit the right to counsel to a person in custody as the Court recognized that an individual could convict himself by waiving his constitutional rights before the "in custody" status had been reached.

Fully consistent with *Miranda*, the Supreme Court in *Escobedo v. Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed. 2d 977 (1964), made its position clear that the police should obtain independent evidence against an individual and not rely upon his convicting himself:

"We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

'[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incom-

1. See *Kamisar*, "A Dissent From the *Miranda* Dissents", 65 Mich. Law Review 59, 66 (1966): "Moreover, I think it plain that the last stand will not be made in the stationhouse. By defining 'custodial questioning' to mean 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,' the *Miranda* Court seemed to anticipate still other battlefields—the squad car, the streets, public places, and even homes."

plete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. . . . Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3rd ed. 1940), 309. (Emphasis in original.). . .

"We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." 378 U.S. 478 at pp. 488-490.

II. Taxpayer Has the Right Under Arizona Law to Prevent the Government from Examining and Photocopying the Work Papers of His Accountant.

Although Sidney Markow, taxpayer's accountant, voluntarily let the Special Agent examine his work papers, these work papers are protected from disclosure by the Arizona Accountant's Privilege.² As a result, Mr. Markow had no legal right under State law to divulge these documents without the express permission of Mr. Selinger.

2. "Certified public accountants and public accountants practicing in this state shall not be required to divulge, nor shall they voluntarily divulge information which they have received by reason of the confidential nature of their employment. Information derived from or as a result of such professional source shall be deemed confidential, but this section shall not be construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or the United States." A.R.S. § 32-749.

In this area of the law, the Ninth Circuit, in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960), held that Federal Courts would follow the law of the forum state in determining the rules of privilege where there is no Federal statute establishing such privilege. Since there is no federally created accountant's privilege, the District Court sitting in Arizona is obligated to apply the Arizona Accountant's Privilege. See *United States v. Ladner*, 238 F.Supp. 895 (S.D. Miss. 1965).

The two cases cited by the government in its brief, *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964) and *In re Fahey*, 300 F.2d 383 (6th Cir. 1961) are not applicable because neither of those cases discussed a state-created accountant's privilege.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order denying appellants' motion for the return of property and suppression of evidence be reversed, and the cause remanded with instructions to enter an order to return property and suppress evidence.

DAVID R. FRAZER

JOHN C. KING

SHIMMEL, HILL, KLEINDIENST & BISHOP

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. FRAZER

No. 21,016 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation, <i>Appellant and Cross-Appellee,</i> vs. E. B. WELCH, <i>Appellee and Cross-Appellant.</i>	}
--	---

APPELLANT'S REPLY BRIEF
AND
CROSS-APPELLEE'S ANSWERING BRIEF

LILICK, McHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
311 California Street,
San Francisco, California 94104,
Attorneys for Appellant
and Cross-Appellee.

FILED

MAR 2 1967

MAR 6 1967

WM. B. LUCK, CLERK

Subject Index

	Page
The appeal	1
The facts as stated by appellee	1
I. Evidence in the record below	3
A. The findings	3
B. Appellee's citation of "ample support"	4
II. The legal standard of unseaworthiness	6
The cross-appeal	8
A. There is substantial evidence in the record to show that safe alternatives were available to cross-appellant	9
B. The failure of the injured seaman to request additional help to aid him in part of his assigned task was properly found to be contributory negligence	10
C. Cross-appellant cannot insulate himself from contribu- tory negligence merely because he was working on a task assigned by a superior	12
Conclusion	13
Appendix:	
Libelant's Proposed Finding No. 5	i
Libelant's Proposed Finding No. 8	ii

Table of Authorities Cited

Cases	Pages
American President Lines, Ltd. v. Redfern, 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.)	6, 7
Ammar v. American Export Lines, Inc., 326 F.2d 955 (2d Cir. 1964), cert. denied, 379 U.S. 824, rehearing denied, 379 U.S. 985	4, 5
Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 1964 A.M.C. 1925 (4th Cir. 1963)	11
Blier v. U.S. Lines, 286 F.2d 920 (2d Cir. 1951), cert denied, 368 U.S. 836	5
Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 1957 A.M.C. 647	4
Hudson Waterways Corporation v. Schneider, 365 F.2d 1012, 1966 A.M.C. 2411 (9th Cir.)	12
Ktistakis v. United Cross Navigation Co., 316 F.2d 869, 1963 A.M.C. 1211 (2d Cir.)	11
McAllister v. United States, 348 U.S. 19, 1954 A.M.C. 1999	8
Michalic v. Cleveland Tankers, 364 U.S. 325, 1960 A.M.C. 2251	10
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 1960 A.M.C. 1503	7
N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498 (1950), 1951 A.M.C. 407	8
Nieroli v. Den Norske Afrika, 332 F.2d 651, 1964 A.M.C. 1413 (2d Cir.)	11
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 1939 A.M.C. 1	11, 12
Victory Carriers, Inc. v. Guiton (9th Cir. No. 20,405)	7
Waldron v. Moore-McCormack Lines, Inc., 356 F.2d 247 (2d Cir. 1965)	7

Codes

California Evidence Code:	
Section 450	6
Section 451	6
Section 452	6

No. 21,016

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,

a corporation,

Appellant and Cross-Appellee,

vs.

E. B. WELCH,

Appellee and Cross-Appellant.

APPELLANT'S REPLY BRIEF

AND

CROSS-APPELLEE'S ANSWERING BRIEF

THE APPEAL

The Facts as Stated by Appellee

The Court below found the vessel unseaworthy because a mature Chief Engineer (the highest official Coast Guard License) carried a 42-pound 6" square metal block alone. Finding No. 7 (R. I, 43, 44). The appeal followed because there is no testimony in the record to support the Court's finding that the carrying of a 42-pound crosshead was improper. The plaintiff's own uncontradicted testimony was that the carrying of objects up to 80 or 90 pounds was usual and customary (R. II, 62). It was only the weight, which he testified was about 110 to 125 pounds (R. II, 15), which caused any problem in carrying the crosshead (R. II, 62).

Faced with the above obvious problems, Appellee, just as he did below, has resorted to the same critical factual misstatements which have already been considered and rejected by the District Court. Contrary to Appellee's statement at page 8, the crosshead was not an "*unwieldly*" object. There is no finding by the District Court that it was "*unwieldly*". In an attempt to introduce this same element of clumsiness into the liability aspect, plaintiff's attorney in preparing suggested Findings of Fact specifically asked the Court to find that it was "*awkward*" to carry the crosshead (Libelant's Proposed Finding No. 5, R. I, 55).¹ The vessel objected and the Court thereafter entered its own Findings of Fact and refused to adopt Welch's proposed finding.

As the Court below clearly held, plaintiff was hurt while carrying a 42-pound crosshead (Finding No. 7, R. I, 43, 44). The Court did *not* make a finding that plaintiff hurt his back while carrying a 100-pound piston, or a piston of any weight. Appellee, however, in his Brief, repeatedly joins the carrying of the 42-pound object with 100-pound objects. "Appellee * * * suffered * * * injuries * * * [while] *carrying heavy parts* * * *." (Emphasis added, pp. 1, 2). "He sustained injury *while carrying the several heavy parts* * * *." (Emphasis added, p. 2).

In addition to implying that the Court found that Mr. Welch had somehow hurt his back while carrying the pistons (which the Court did *not* find), Appellee points to his own testimony, given upon the reopening of his case

¹See Appendix at end of this Brief for full quotation of Libelant's Proposed Finding No. 5.

under the circumstances correctly described in Appellant's Footnote No. 2, p. 8 of its Opening Brief. Welch then testified that he felt some "tightness" in his back after carrying the 100-pound pistons. As Appellant suggested in its Opening Brief (p. 8, fn. 2), it felt that testimony was subject to question with respect to its accuracy. Libelant specifically asked the Court to find that Libelant had developed "tightness" in his back while carrying the pistons (Libelant's Proposed Finding No. 8, R. I, 55).² Appellant objected to that finding and the District Court also rejected Libelant's proposed finding that he had developed "tightness" in his back while carrying the pistons.

Thus, Appellee is still faced with the same problem that he faced when he first rested his case at the conclusion of the first day of trial. There was no evidence that carrying a 42-pound crosshead was improper, and it was apparent that the vessel would show the true weight of the object the next day. If there was any evidence in this record to support the critical finding, Appellee's Brief would have simply quoted that testimony and rested its attempted defense of the decree, instead of using 26 pages of its brief in an attempt to avoid the obvious.

I. EVIDENCE IN THE RECORD BELOW

A. The Findings

Nowhere does Appellant contend that anything other than the "clearly erroneous rule" is applicable. Appellee, however, attempts to interject a few "straw men".

²See Appendix at end of this Brief for full quotation of Libelant's Proposed Finding No. 8.

Likewise, Appellant makes no contention that the Court's findings are inadequate *as Findings*. Appellant has simply pointed out that there are certain undisputed facts which, when measured against the Findings, indicate that the critical Findings are not supported by the testimony.

"Proximate cause" is Appellee's next straw man (Appellee's Brief, pp. 14, 15). The District Court (Finding No. 9, R. I, 44) found that Welch's injuries were the "direct and proximate result" of what the Court considered to be unseaworthiness. Appellant has not appealed from Finding No. 9, and has great difficulty in understanding why Appellee has addressed any portion of his Brief to this supposed issue. Appellant firmly believes the Court should understand, however, that the "quotation" on page 15 of Appellee's Brief is not in fact a quotation from the *Ferguson* case, as it purports to be, but is a very material departure from the exact language of the Supreme Court in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 1957 A.M.C. 647.³

B. Appellee's Citation of "Ample Support"

The thrust of the entire appeal by Appellant is that the critical *Findings* are not supported by the *testimony*, and therefore reference to the Court's Findings is of no help.

³The actual quote is, "Under this statute [Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing * * *." Moreover, Appellee is confused as to the test of proximate cause. In a Jones Act case, it is as stated in *Ferguson*. But in a claim for unseaworthiness—the case *sub juris*—the test is the same as that used in common law negligence. See *Ammar v. American Export Lines, Inc.*, 326 F.2d

The repeated reference to the "tightness" in the back of Welch while he was carrying the 100-pound pistons (Appellee's Brief, p. 17) has previously been discussed.

Despite the extended quotations of Pak's testimony at page 18 of Appellee's Brief, the Court will note that there is no quotation from the testimony of any witness stating that carrying a 42-pound crosshead on this or any other ship was a "two-man job". In fact, Appellee has failed to advise the Court that Pak was referring to a crosshead which he thought weighed "*about a hundred pounds*" (Pak, p. 7).

Pak testified on cross-examination that as far as he knew there was no reason why the crosshead could not be dismantled, and when dismantled, carrying each half (which he obviously thought weighed about 50 pounds) was a *one-man job* (Pak, p. 22). Therefore, Pak's testimony can only be read as meaning that the carrying of a 42-pound crosshead was strictly proper.

Appellee's quotation of the Judge's oral comments at the conclusion of the case (Appellee's Brief, pp. 19, 20) shows conclusively that the Judge substituted his personal opinion for the testimony in the case. He thought it was hard work for a man to carry a 42-pound object under these circumstances, notwithstanding the fact that there was testimony directly contrary by Welch, and notwithstanding the fact that there was no testimony supporting the Judge's personal impression. The Judge has, in effect, imported a concept akin to judicial notice, but

955 (2d Cir. 1964), cert. denied, 379 U.S. 824, rehearing denied, 379 U.S. 985; *Blier v. U.S. Lines*, 286 F.2d 920 (2d Cir. 1951), cert. denied, 368 U.S. 836.

in a highly specialized area where there is *no* common knowledge of mankind upon which the courts, seamen, or shipowners can rely.⁴

At pages 20 and 21 of its Brief, Appellee sets up another "straw man" concerning the effect of industry practices. Industry practices are not conclusive, and Appellant never said they were. What Appellant has argued is that industry practices as testified to and admitted by Appellee Welch personally (and uncontradicted by any other testimony) are of great weight. The Court cannot disregard that testimony and make findings based upon the Court's own impressions.

II. THE LEGAL STANDARD OF UNSEAWORTHINESS

Appellee misunderstands the thrust of Appellant's argument concerning *American President Lines, Ltd. v. Redfern*, 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.).

Appellant contends that the carrying of a 42-pound weight, easily handled, cannot be said to be a "dangerous condition" within the meaning of the *Redfern* case, where there is no testimony in the record that the carrying of such a 42-pound weight was improper. In the *Redfern* case there was ample evidence that when the sea valve was stuck, it took two men, or one man and additional ap-

⁴The Federal Courts in California adhere to the *Cal. Evidence Code*. Section 450 states, "Judicial notice may not be taken of any matter unless authorized or required by law." Sections 451 and 452 set forth which matters may or are required to be judicially noticed. An examination of each shows that in the case sub juris the Judge should not have used judicial notice in this area.

pliances, to open the stuck sea valve safely, i.e., if one man were assigned the task, a dangerous condition would exist.

As Appellee admits, there is a serious conflict between the Second and Ninth Circuits in the Opinions of *Waldron v. Moore-McCormack Lines, Inc.*, 356 F.2d 247 (2d Cir. 1965), and *Redfern, supra*. One might therefore expect a decision by the Supreme Court in the near future. Even if the Supreme Court were to reverse *Waldron* and adopt *Redfern*, Appellant herein contends there is no evidence of any "dangerous condition" in the Welch case, such as was required for a finding of unseaworthiness in the *Redfern* case.

Appellant has referred to the decision of the same District Court Judge in *Victory Carriers, Inc. v. Guiton* (9th Cir. No. 20,405) (Appellant's Brief, pp. 12, 13), for the very simple reason that this opinion, which is the only written opinion by the same District Court Judge on the question of unseaworthiness, clearly shows that the Court below considers unseaworthiness to be equivalent to the "accident-proof ship" which the Supreme Court said the shipowner is *not* required to provide (*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 A.M.C. 1503).

With the benefit of hindsight, every injury could have been avoided by doing a task in a somewhat different manner. Neither shipowners nor seamen, however, should have their rights determined by a principle which allows each Judge, in each case, to individually decide what he thinks constitutes "seaworthiness" to the exclusion of the testimony presented to the Court. This "principle" is simply anarchy.

THE CROSS-APPEAL

If the Court sustains Appellant's contentions in the principal appeal, there will be no reason to consider the Cross-Appeal. However, if the unseaworthy finding is sustained, then clearly there is substantial evidence in the record to sustain the District Court's contributory negligence finding.

Cross-Appellant cannot prevail on his Cross-Appeal because he has failed to show that the finding that "libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964" was clearly erroneous (Finding No. 20, R. I, 47). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'." (Citations omitted). *McAllister v. United States*, 348 U.S. 19, 20, 1954 A.M.C. 1999.

As the Supreme Court has clearly held in defining the roles of the Appellate and Trial Courts: "This is not the place to reverse * * * because were we in [the lower court's] place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *N.L.R.B. v. Pittsburg Steamship Co.*, 340 U.S. 498, 503 (1950), 1951 A.M.C. 407.

Cross-Appellant once again misstates the finding of the lower court. At page 28 of his Brief he states, "In the course of carrying these parts, Appellee was injured (Finding No. 7, R. I, 43, 44)." The lower court found that the injury occurred while "carrying the crosshead"

(Finding No. 7, R. I, 43, 44) and not while carrying “parts”. This repeated misstatement has already been discussed.

A. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SHOW THAT SAFE ALTERNATIVES WERE AVAILABLE TO CROSS-APPELLANT.

Cross-Appellant attempts to have this Court believe the lower court was clearly erroneous in finding contributory negligence because the shipowner did not show that there was an individual who was standing idly by, waiting to assist Cross-Appellant. What Cross-Appellant has labeled “substantial evidence to the contrary” (Appellee’s Brief, p. 30) is merely evidence that the members of the crew were performing their assigned tasks. The question asked of Goodheim (Appellee’s Brief, p. 30) was, “Was there any *extra* help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?” (emphasis added). He answered, “No, sir.” Appellant need not prove that *extra* help was available at the time in question; it merely needs to show that a safe alternative was available to Welch, i.e, that he should have stopped when he learned that he would have to carry the crosshead by himself and should have requested his superiors to assign someone to help him. Clearly, there is direct as well as circumstantial evidence in the record to support the Trial Court’s finding.

Pak assigned help when requested to do so (Pak, pp. 32, 34). There were a number of men working in both Engine Rooms of the vessel at the time of the accident.

Of course, they were occupied with other tasks, otherwise they would not have been in the Engine Rooms. It is not necessary to prove *which* man Pak would have reassigned to help Welch, and such testimony would have been objectionable as speculative. Indeed, Pak might have called someone else out, but he was never asked for any help by Welch.

The District Court obviously based its finding on the direct evidence that it was Pak's practice and responsibility to assign men to assist others when requested, and upon the circumstantial evidence that members of the crew were working nearby. "Direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers*, 364 U.S. 325, 330, 1960 A.M.C. 2251. The District Court properly took into consideration the direct evidence and the circumstantial evidence from which it could draw all reasonable inferences. The reasonable inference is obvious: Although there were no members of the crew standing idly by Welch at the time in question, Pak had the authority and would have taken any one of several crew members and assigned him to assist Welch in carrying the crosshead.

B. THE FAILURE OF THE INJURED SEAMAN TO REQUEST ADDITIONAL HELP TO AID HIM IN PART OF HIS ASSIGNED TASK WAS PROPERLY FOUND TO BE CONTRIBUTORY NEGLIGENCE.

Cross-Appellant's Brief in this section seems to be concerned with two general rules which are not challenged

in this case: (1) The question of unseaworthiness shall not be determined by deciding whether the seaman was also contributorily negligent (i.e., *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 1964 A.M.C. 1925 (4th Cir. 1963)). (2) Assumption of risk is no defense in a seaman's case (i.e., *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 1939 A.M.C. 1).

There was no finding that plaintiff had a duty to *provide* assistance. This duty, if it exists, was the duty of the shipowner. The duty of the Cross-Appellant was to *request* assistance, and the Court so found (Finding No. 20, R. I, 47).

Cross-Appellant misstates the applicable law at page 34 of his Brief, where he attempts to have the Court believe that "even where a safe alternative is available, the courts have held that use of the defective apparatus does not constitute contributory negligence * * *", and once again attempts to interject assumption of risk into this case. The applicable principle is clear and well defined. The rule is that where an alternative safe course of conduct is available to a plaintiff, his choice of a course known to be unsafe is evidence of contributory negligence. E.g. *Nicroli v. Den Norske Afrika*, 332 F.2d 651, 1964 A.M.C. 1413 (2d Cir.); *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 1964 A.M.C. 1925 (4th Cir. 1963), cert. denied 376 U.S. 970 (1964); *Ktistakis v. United Cross Navigation Co.*, 316 F.2d 869, 1963 A.M.C. 1211 (2d Cir.).

Cross-Appellant urges that the lower court applied the wrong test in deciding whether or not plaintiff's negligent acts contributed to his injuries. The mere fact that the lower court did not state that plaintiff's negligent acts

contributed *directly* to his injuries cannot be used to show that the lower court was clearly erroneous. The Court found that plaintiff's negligent act contributed 50 per cent to his injuries. It follows that Welch's conduct had to have been a substantial, direct cause of his injury.

C. CROSS-APPELLANT CANNOT INSULATE HIMSELF FROM CONTRIBUTORY NEGLIGENCE MERELY BECAUSE HE WAS WORKING ON A TASK ASSIGNED BY A SUPERIOR.

If Cross-Appellant's contention were correct, only a Captain could be contributorily negligent because every other seaman works under orders in a chain of command. The lower court specifically found what Cross-Appellant refuses to admit: The mere fact that he was told to do a job, does not excuse him from measuring up to the standards of the "reasonable man" while performing that task.

Hudson Waterways Corporation v. Schneider, 365 F.2d 1012, 1966 A.M.C. 2411 (9th Cir.), cited in Cross-Appellant's Brief at page 33, clearly indicates that a finding of contributory negligence is proper in a situation such as the instant one. Plaintiff should have stopped and requested assistance to carry the crosshead. This was a safe alternative which was open to him. His attempt to proceed by himself was a negligent act.

Throughout his Cross-Appeal, Cross-Appellant has attempted to intermingle contributory negligence with the doctrine of assumption of risk. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 1939 A.M.C. 1, clearly holds that proceeding to work with an obviously defective item, instead

of choosing a safe alternative, is only evidence of contributory negligence, but it *is* evidence of that fact. Accordingly, the lower court was not clearly erroneous in finding that Cross-Appellant should have proceeded under the alternative safe route available to him at the time of his injury—he should have requested assistance from his superiors instead of proceeding to carry the crosshead by himself.

CONCLUSION

For the foregoing reasons, we submit that this Court should set aside Findings 6 and 8 and Conclusion 2 and reverse the Decree below, or in the alternative this Court should affirm Finding 20.

Dated, San Francisco, California,

March 1, 1967.

Respectfully submitted,

LILLYCK, McHose, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,

FREDERICK W. WENTKER, JR.,

*Attorneys for Appellant
and Cross-Appellee.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

FREDERICK W. WENTKER, JR.,
*Of Attorneys for Appellant
and Cross-Appellee.*

(Appendix Follows)

Appendix

Appendix

Libelant's Proposed Finding No. 5:

The accident to libelant occurred in the early afternoon of February 19th, 1964, on board the respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly and on the morning of February 19th, the libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs, since the ship could not safely go to sea unless this standly pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight and are *awkward to handle*. Each piston weighs about 100 lbs.; the crosshead alone, without its tail-piece, weighs some 42 lbs. (Emphasis added.)

Libelant's Proposed Finding No. 8:

In the early afternoon of said date, libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump *whereupon a tightness developed in his back*. Libelant next lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying these pistons and the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19th, 1964. The Court does not feel that it is important or crucial to determine just at what point or at what instant in the course of transporting these parts that libelant's injuries occurred since the lifting and carrying of each piston and the crosshead was a two-man job under the circumstances. However, the preponderance of evidence showed, and the Court finds, that libelant sustained injuries to his back and spine while lifting and carrying the crosshead from the pump, up the ladder and over the coaming of the watertight door toward the Machine Shop on the early afternoon of February 19th, 1964; and further, that said crosshead was a substantially heavy piece of equipment which required the strength and agility of more than one man to transport same from the pump to the Machine Shop under the circumstances. (Emphasis added.)

No. 21,016 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

Appeal and Cross-Appeal from an Admiralty Decree
of the United States District Court for the
Northern District of California
Honorable Bruce R. Thompson, District Judge

CROSS-APPELLANT'S REPLY BRIEF

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,

123 Second Street,
San Francisco, California 94105.

Attorneys and Proctors for **FILED**
Appellee and Cross-Appellant.

APR 5 1967

APR 7 1967

WM. B. LUCK, CLERK

Subject Index

	Page
A. The claimed existence of a safe alternative open to the injured seaman is clear speculation without direct or circumstantial evidentiary support	1
1. Measure of proof—Burden on Shipowner to prove contributory fault by a preponderance of the evidence	1
2. The record in this case—Failure of proof on the contributory fault issue	2
B. Diligent performance of an assigned task with the means provided at hand by the employer cannot constitute contributory negligence on the part of the injured seaman	6
C. Conclusion	8

Table of Authorities Cited

	Pages
Hudson Waterways Corporation v. Schneider (9th Cir., 1966), 365 F. 2d 1012.....	6, 7
In re Gulf Canal Lines, Inc. (S.D. Texas, 1963), 216 F. Supp. 434	1
Nieroli v. Den Norske Afrika (2nd Cir., 1964), 332 F. 2d 651	2

No. 21,016

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation, <i>Appellant and Cross-Appellee,</i> vs. E. B. WELCH, <i>Appellee and Cross-Appellant.</i>	}
--	---

Appeal and Cross-Appeal from an Admiralty Decree
of the United States District Court for the
Northern District of California
Honorable Bruce R. Thompson, District Judge

CROSS-APPELLANT'S REPLY BRIEF

**A. THE CLAIMED EXISTENCE OF A SAFE ALTERNATIVE
OPEN TO THE INJURED SEAMAN IS CLEAR SPECULATION
WITHOUT DIRECT OR CIRCUMSTANTIAL EVIDENTIARY
SUPPORT.**

**1. Measure of Proof—Burden on Shipowner to Prove Contribu-
tory Fault by a Preponderance of the Evidence.**

Cross-Appellee refuses to address itself to the central issue on this cross-appeal. The question is: has the shipowner sustained its burden of proof on the affirmative defense of contributory negligence?

See:

In re Gulf Canal Lines, Inc. (S.D. Texas, 1963)
216 F. Supp. 434.

In placing its reliance on the "safe alternative" theory, the shipowner states the principle of law as follows (Cross-Appellee's Answering Brief, p. 11): "The rule is that where an alternative safe course of conduct is available to a plaintiff, his choice of a course known to be unsafe is evidence of contributory negligence." Cross-Appellee cites *Nicroli v. Den Norske Afrika* (2nd Cir., 1964), 332 F. 2d 651, in support of this proposition.

In *Nicroli*, supra, a longshoreman had the choice of walking on the slippery in-shore or on the dry and safe off-shore side of the vessel. He *knowingly* took the dangerous in-shore route. In affirming the trial court's reduction of damages for contributory negligence, the Second Circuit concluded that the proof demonstrated (1) the existence of a safe alternative; and (2) the longshoreman's knowledge of the alternative. (*Nicroli*, supra, 332 F. 2d 654-55.) In the instant case, the "safe alternative" simply did not exist.

2. The Record in This Case—Failure of Proof on the Contributory Fault Issue.

Cross-Appellee, in its Answering Brief, has failed to cite *any* evidence contained in the record which demonstrates that a "safe alternative (assistance)" *was available* to Mr. Welch on the afternoon of February 19, 1964. Instead, the shipowner seeks to construct a theory based on pure speculation which it characterizes as "circumstantial evidence" to remedy this deficiency in proof. It argues that (1) "... it was Pak's practice and responsibility to assign men to

assist others when requested”; and (2) “members of the crew were working nearby”. (Cross-Appellee’s Answering Brief, p. 10.) Thus, the shipowner’s argument goes, someone, somewhere, would have been assigned, had a request been made. Such argument is specious and unsound. The invalidity and speculative nature of the shipowner’s position is in fact revealed by Cross-Appellee’s own statement that “testimony concerning *which* man was available for such task would be too ‘speculative’”. (Cross-Appellee’s Answering Brief, p. 10.)

The reason that Cross-Appellee does not desire to dwell on the question of who, if anyone, would have been assigned to help Mr. Welch is that the record affirmatively shows there in fact was no one available for such assignment at the time. Although Cross-Appellant did not have the burden of coming forth or going forward with proof that help was unavailable, the only evidence in the record supports this view.

While Mr. Pak, the First Assistant Engineer, did testify that *normally* “he could supply help on request” he also affirmed that “. . . the situation wasn’t normal. We had a lot of repairs going on.” (Pak, 33.) Mr. Goodheim, the Second Assistant Engineer, who was Mr. Welch’s immediate supervisor, testified as follows:

“Q. Did you have any supervisory duties over Mr. Welch in connection with his repair to this pump that he was working on?

A. Yes.

Q. What were your duties?

A. I was in charge of the work in the forward engine room.

Q. Well, were you in charge of the repair which he was doing, or was he in charge of it, or were you both in charge of it? Please explain the relation to me.

A. As senior engineer I was the man that was responsible.

Q. Did you instruct him to do this job?

A. Yes.

Q. Did you assign any help to him?

A. Yes.

Q. How much help did you assign to him?

A. I think he had one man with him in the morning, *as long as it was possible to keep him on the job with him.*

Q. Was there more than one man assigned to work with Mr. Welch?

A. I believe there was a wiper and a maintenance man, originally.

Q. Do you recall their names?

A. No I don't.

Mr. Jarvis: You are talking about the morning of the same day.

The Witness: The morning.

Mr. Jarvis: Up until noon.

The Witness: At the starting of the job.

Q. (By Mr. Wentker) Is it your testimony that sometime during the day these two men, or one man, whatever the case may have been, were taken away from that job?

A. Yes sir.

Q. Did you see them taken away?

A. They were taken away on the First Assistant's orders.

Q. That, you believe, is Mr. Smith?

A. Yes.

Q. Did anybody come and tell you that these men were to be taken away?

A. I believe one of the other Seconds informed me that all men were going to the after engine room on the boilers." (Goodheim, 25-26.) (Emphasis added)

Thus, during the entire afternoon up to and including the time of injury, all of the evidence in the record indicates that the vessel's engine room was plagued with many problems. Both Welch and Goodheim were without assistance, and the men who had been assigned to the forward engine room that morning had been sent into the after engine room to work on the leaky boilers. It was, as Mr. Pak testified, an "abnormal situation". If there are any inferences to be drawn from the evidence in the record, it is certainly not that a man would have been assigned if requested. It is rather clear, without inference, that there was no one available at the time to assist Mr. Welch, and it was necessary for him to finish the assigned task with whatever means he had at hand.

B. DILIGENT PERFORMANCE OF AN ASSIGNED TASK WITH THE MEANS PROVIDED AT HAND BY THE EMPLOYER CANNOT CONSTITUTE CONTRIBUTORY NEGLIGENCE ON THE PART OF THE INJURED SEAMAN.

Cross-Appellee misunderstands our position with respect to obedience to orders. It is not that all members of the crew, with the exception of the Captain, are "insulated" from contributory negligence. It is rather that diligently following of an order of a superior officer aboard ship, *in itself* does not and cannot constitute contributory negligence.

Cross-Appellee has not shown that Mr. Welch, in performing the task of carrying the cross-head and two pistons to and from the machine space did anything below the standard of a reasonable man under the circumstances. The record stands uncontradicted that he completed his task in a reasonable and attentive manner with the means provided at hand. Cross-Appellee, instead, argues that he should have *stopped* the performance of his duties in the hope that someone would be or become available. (Cross-Appellee's Answering Brief, p. 12.)

This argument calls upon Mr. Welch to disregard what he knew, namely: (1) that all available men had been assigned to leaky boilers in the ship's other engine room; and that (2) Mr. Goodheim, his superior, who was working *alone* nearby, had been unable to provide him with assistance; and further, that (3) the task had to be completed with dispatch so that the ship could sail the next day. In such a setting, the recent language of this Court in the case of *Hudson*

Waterways Corporation v. Schneider (9th Cir., 1966), 365 F. 2d 1012, 1014, is directly in point:

“One factor contributing to this peculiar status of the seaman is that he is obliged to obey whatever order he is given, under pain of severe penalties. ‘He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe.’ Norris, *The Seaman as Ward of the Admiralty*, 52 Mich. L. Rev. 479, 497 (1954). This has been the case in the past: ‘From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract.’ *Robertson v. Baldwin*, 165 U.S. 275, 282, 293, 17 S. Ct. 326, 329, 41 L. Ed. 715. The duty of obedience has not lessened with the passage of time. He must obey the lawful orders of the master and of his superior officers, and for wilfully disobeying the master’s commands he may be punished by being clapped in irons. 46 U.S.C. §701(4)(5).”

“Because of this unique status of seamen, necessitated by the rigors of the sea, the courts have long since decided that the burden of the risks incident to their calling should be borne by the shipowners.”

C. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on Cross-Appellant's part and in that regard, the Decree should be set aside with directions to the court below to enter a new decree in the total amount of Appellee and Cross-Appellant's damages in the sum of Thirty-eight Thousand Four Hundred Fifty (\$38,450.00) Dollars, with legal interest from November 24, 1965 and costs to the Appellee and Cross-Appellant.

Dated, San Francisco, California,
April 3, 1967.

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
By MARTIN J. JARVIS,
Attorneys and Proctors for
Appellee and Cross-Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARTIN J. JARVIS,
Attorney and Proctor for
Appellee and Cross-Appellant.

No. 21,016 ✓

IN THE

United States Court of Appeals
For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation, <i>Appellant and Cross-Appellee,</i> vs. F. B. WELCH, <i>Appellee and Cross-Appellant.</i>	}
--	---

PETITION FOR REHEARING BY CROSS-APPELLANT

JARVIS, MILLER & STENDER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
123 Second Street,
San Francisco, California 94105,
Attorneys and Proctors for
Appellee, Cross-Appellant
and Petitioner.

FILED

MAY 19 1967

WM. B. LUCK, CLERK

No. 21,016

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,
vs.

E. B. WELCH,
Appellee and Cross-Appellant.

PETITION FOR REHEARING BY CROSS-APPELLANT

To the Honorable Oliver B. Hamlin, Jr., Circuit Judge; Frederick G. Hamley, Circuit Judge; and Ben C. Duniway, Circuit Judge:

Cross-Appellant, E. B. Welch, hereby petitions for a rehearing on his Cross-Appeal, respectfully requesting this Court to reconsider that portion of the decision and judgment entered on April 21, 1967 in this action regarding the issue of contributory negligence, on the following grounds:

1. Prejudicial omission of a material fact: The record below shows without conflict that no help or helpers (men) were in fact available to aid Cross-

Appellant, had he requested help in connection with the assigned task (Goodheim, 7-8; 25-26; R. II, 69; R. II, 68; Pak 10, 25-26, 33).¹ The Court of Appeals omitted this material fact from its opinion; had the Court of Appeals considered this undisputed fact, the finding of the District Judge must be reversed on the issue of contributory negligence as clearly erroneous, because Cross-Appellant's failure to request help, *where no help was in fact available*, could not then have contributed to the occurrence of the accident as a matter of law.

2. The decision of the Court of Appeals is in conflict with the holding of the Third Circuit in *Size-more v. United States Lines Co.*, 323 F. 2d 774 (3rd Cir., 1963) affirming 213 F. Supp. 76, 81-83 (E.D. Pa., 1962). Before the rule of comparative fault and divided damages can be applied, negligence, if any, on the part of the injured seaman must be shown to have been a proximate cause or to have at least substantially contributed to the happening of the accident.

In this regard the decision of the Court of Appeals is also contrary to the law of the land on the issue of contributory fault (see Restatement of Torts, 2d §465 (1)).

3. Cross-Appellee (the shipowner-employer) did not sustain its burden of proof on the issue of con-

¹All the evidence on no help being available to Cross-Appellant and the reasons for this unusual situation aboard the ship on the afternoon of the accident are set forth verbatim from the record for convenient reference in the Brief of Appellee and Cross-Appellant, pages 30-31, and in Cross-Appellant's Reply Brief, pages 2-5 on file herein.

tributory negligence in that the record below discloses a complete failure of proof on the vital element of causal connection between Cross-Appellant's omission to request help and the resultant accident.

For the foregoing reasons, it is respectfully submitted that a rehearing on Cross-Appeal be granted; that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on Cross-Appellant's part, and in that regard, the Decree should be set aside with directions to the Court below to enter a new decree in the total amount of Appellee and Cross-Appellant's damages as found by the District Judge in the sum of Thirty-eight Thousand Four Hundred Fifty (\$38,450.00) Dollars with legal interest from November 24, 1965 and costs to the Appellee and Cross-Appellant.

Dated, San Francisco, California,

May 18, 1967.

JARVIS, MILLER & STENDER,

MARTIN J. JARVIS,

EUGENE A. BRODSKY,

By MARTIN J. JARVIS,

*Attorneys and Proctors for
Appellee, Cross-Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I certify that this Petition for Rehearing is not interposed for delay and that in my judgment, it is well founded.

MARTIN J. JARVIS,
*Attorney and Proctor for
Appellee, Cross-Appellant
and Petitioner.*

No. 21,016 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AMERICAN PRESIDENT LINES, LTD.,

a corporation,

Appellant and Cross-Appellee,

VS.

E. B. WELCH,

Appellee and Cross-Appellant.

PETITION OF APPELLANT FOR REHEARING

LILLICK, McHOSE, WHEAT, ADAMS & CHARLES,

GRAYDON S. STARING,

FREDERICK W. WENTKER, JR.,

311 California Street.

San Francisco, California 94104,

Attorneys for Appellant and Petitioner.

AT 261967

FILED

MAY 19 1967

WM. B. LUCK, CLERK

No. 21,016

IN THE

United States Court of Appeals For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD., a corporation, <i>Appellant and Cross-Appellee,</i> vs. E. B. WELCH, <i>Appellee and Cross-Appellant.</i>	}
--	---

PETITION OF APPELLANT FOR REHEARING

*To the Honorable Oliver D. Hamlin, Jr., Frederick G.
Hamley, and Ben Cushing Duniway, Circuit Judges:*

**APPELLANT PETITIONS THE COURT FOR REHEARING BE-
CAUSE THE DECISION WAS REACHED UPON A FACT
STATED TO BE IN THE RECORD, WHICH FACT IS NOT
IN THE RECORD.**

The Court at page 5 of its Opinion disposes of Appel-
lant's Specification No. 1 by saying that there was "ample
testimony in the record * * * that the carrying * * * of the
crosshead was a two-man job. Appellant produced no wit-
ness to testify to the contrary." Both statements are un-
true. We assume the Court does not desire to rest its
judgment upon false premises.

Welch, Pak and Goodheim testified that the carrying of the crosshead “was a two-man job”; however, the record also shows it had never been carried before, and that these witnesses were all talking about carrying a crosshead which weighed 100 to 125 pounds. Appellant thereafter produced one witness (Deering), who testified to the contrary—that the object weighed 42 pounds. The Weighmaster’s Certificate corroborates Deering’s testimony. The crosshead itself is in evidence.

Welch’s own testimony was that it was perfectly proper by custom and practice aboard merchant vessels for engineering personnel to carry weights up to 80 to 90 pounds, and it was only the weight about which he was complaining. There is no contrary testimony.

The Court of Appeals’ Opinion is simply wrong in stating that the trial record supports the Opinion. The matter has been fully briefed to the Court with appropriate references to the record. Nowhere in the Briefs is there any citation to the record indicating that the carrying of a 42-pound crosshead requires two men on this or any other ship. Nowhere in the Briefs is there any citation to the record indicating a contradiction to Welch’s testimony that by custom and practice on *all* merchant vessels it was perfectly proper to carry weights up to 80 to 90 pounds, much less 42 pounds. The Court of Appeals has not cited or quoted any such testimony either.

The District Court fully considered all of the claims of the plaintiff, and specifically found that the cause of the accident was *solely* the carrying of the crosshead. Plain-

tiff's attempt to escape this finding and to find liability on other aspects of the work was rejected in the District Court, and this has been fully treated in the Briefs and on oral argument.

The record does not support the Judgment. Nowhere in this record is there any testimony that the carrying of a 42-pound crosshead was a two-man job. The testimony of Pak, Welch and Goodheim that carrying the crosshead "was a two-man job", referred to a much larger, and totally irrelevant object. Deering, and also Welch on cross-examination, proved conclusively that the opinions offered by Welch's witnesses were worthless and irrelevant with reference to a 42-pound crosshead, and thereafter Welch offered no further proof.

Since the decision of this Court in this case, the Supreme Court has rendered its Opinion in the case of *Waldron v. Moore-McCormack Lines*, 35 U.S. Law Week 4389. In that Opinion the Supreme Court sustained the proposition that a ship may be found unseaworthy where the sole cause of unseaworthiness refers to an assignment of an insufficient number of men to do a particular job, and as a result an injury occurs. If Welch had been hurt in dismantling the pump, a portion of the task which undeniably required two men, and for which he actually had a helper, the trial court's decision would have to be affirmed, simply upon the *Waldron* Opinion. The fact is, however, that the *Waldron* Opinion in no way affects the initial specification of error made by Appellant in this case, since Welch was hurt only while carrying a 42-pound weight.

Appellant respectfully requests that the Court grant Appellant's Petition for Rehearing, and reverse the Decision of the Trial Court with respect to the initial finding of liability.

Dated, San Francisco, California,

May 19, 1967.

Respectfully submitted,

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,

FREDERICK W. WENTKER, JR.,

Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I, Frederick W. Wentker, Jr., of attorneys for Appellant and Petitioner, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

FREDERICK W. WENTKER, JR.,

Of Attorneys for

Appellant and Petitioner.

No. 21,020 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELISHA EDWARDS,

Appellant,

VS.

PACIFIC FRUIT EXPRESS COMPANY,

Appellee.

Appeal from Summary Judgment by the United States District
Court for the Northern District of California

APPELLANT'S OPENING BRIEF

JACK H. WERCHICK,

ARNE WERCHICK,

WERCHICK & WERCHICK,

240 Second Street,

San Francisco, California 94105,

Attorneys for Appellant.

FILED

DEC 2 1966

WM. B. LUCK, CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of the facts	3
Statement of the issue	7
Summary of argument	7
Argument	8
I. Introduction	8
II. The facts of this case are before the court for the first time	10
III. Operations similar to appellee's have already been classified as common carriers by railroad	18
IV. Appellee is a common carrier by railroad under applicable modern guidelines	24
Conclusion	27

Table of Authorities Cited

Cases	Pages
Aguirre v. Southern Pacific, 232 Cal.App.2d 636, 43 Cal. Rptr. 73	8
Alsop v. Southern Express Co., 104 N.C. 278, 10 S.E. 297, 6 L.R.A. 271	22
Bush v. Brooklyn Eastern District Terminal Co., 218 N.Y.S. 516, 218 App.Div. 782	23
Cochran v. United States, 123 F.Supp. 362 (D.C. Conn.)...	28
Eddings v. Collins Pine Company, 140 F.Supp. 622 (N.D. Calif.)	23
Fleming v. Railway Express Agency, 161 F.2d 659 (C.C.A. 7)	21
Fort Street Union Depot Company v. Hillen, 119 F.2d 307...	22, 23
Gaulden v. Southern Pacific Co., 78 F.Supp. 651 (N.D. Calif.), aff'd, 174 F.2d 1022 (C.A. 9).....	passim
Jones v. New York Central, 182 F.2d 326 (C.A. 6).....	21

	Pages
McCabe v. Boston Terminal Co., 303 Mass. 450, 22 N.E.2d 33	23
McCullough v. Jacksonville Terminal Co. (Fla.App.), 176 So.2d 345	22, 23
Moletou v. Union Pacific (Utah), 219 P.2d 1080	8
Mondou v. New York, N.H.&H.R. Co., 223 U.S. 1 (1912)	21
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	21
Pacific Coast Ry. Co. v. United States, 173 Fed. 448 (C.C.A. 9)	20
Pacific Express Co. v. Seibert, 44 Fed. 310 (W.D. Mo.)	22
Pacific Fruit Express Co. v. McColgan, 67 Cal.App.2d 93, 153 P.2d 607	5, 26
Parden v. Terminal R. of Alabama Docks Dept., 377 U.S. 184 (1964)	24
Pfister v. Central Pacific Ry. Co., 70 Cal. 169, 11 Pac. 686, 59 Am.Rep. 404	22
Union Stockyard v. United States, 308 U.S. 213 (1939)	23
United States v. Brooklyn Eastern District Terminal Co., 249 U.S. 296 (1919)	23
United States v. Diebold, Inc., 369 U.S. 654 (1962)	28
Urie v. Thompson, 337 U.S. 163 (1949)	21
Wells Fargo v. Taylor, 254 U.S. 175 (1920)	18, 19, 20

Codes

California Code of Civil Procedure:	
Section 1870(2)	13
California Evidence Code:	
Sections 1220-1222	13
California Labor Code:	
Section 3201 et seq.	2
California Public Utilities Code:	
Section 202	28
Section 211	27
Section 216(e)	28
Section 229	27
Section 230	27

TABLE OF AUTHORITIES CITED

iii

Idaho Code Annotated:	Pages
Section 61-107	28
Section 61-113	28
Montana Revised Code Annotated:	
Section 72-114	28
Section 72-115	28

Constitutions

Arizona Constitution, Article 15, Section 10	28
--	----

Rules

Federal Rules of Civil Procedure, Rule 43(a)	13
--	----

Statutes

Boiler Inspection Act, 45 U.S.C.A., Section 23	21
Federal Employers' Liability Act, 45 U.S.C.A., Section 51. .1, 7, 19	
Federal Safety Appliance Act, 45 U.S.C.A., Section 1	20, 26
Federal Safety Appliance Act, 45 U.S.C.A., Sections 3 and 4	19
Interstate Commerce Act, 49 U.S.C.A., Section 1 et seq.	19
Nevada Revised Statutes, Section 704.020	28
Oregon Revised Statutes, Section 760.010	28
Railroad Retirement Act, 45 U.S.C.A., Section 228	20
Railroad Unemployment Insurance Act, 45 U.S.C.A., Section 351	20
Railway Labor Act, 45 U.S.C.A., Section 151 et seq.	20
32 Stat. 943	26
34 Stats. 584	20
45 U.S.C.A., Section 55	19

Miscellaneous

Interstate Commerce Commission Reports:	
318 I.C.C. 111, 120-121	27
318 I.C.C. 132	6

No. 21,020

IN THE

United States Court of Appeals
For the Ninth Circuit

ELISHA EDWARDS,

Appellant,

VS.

PACIFIC FRUIT EXPRESS COMPANY,

Appellee.

Appeal from Summary Judgment by the United States District
Court for the Northern District of California

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

The United States District Court granted summary judgment for appellee and against appellant. Appellate jurisdiction of this court, from a final judgment below, rests upon 28 U.S.C.A. §225.

This action arises under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C.A. §51 et seq., and more specifically pursuant to appellant's allegation that appellee is "a common carrier by Railroad . . . engaged in interstate commerce between the several states." (Transcript of Record, hereinafter TR, 1.) Appellant's complaint contains the following allegations: appellee was and is a Utah corporation engaged

in interstate commerce as a common carrier by rail within the meaning of the F.E.L.A.; on November 9, 1963, appellant was employed by appellee in furtherance of appellee's railroad operations; because of the careless and negligent maintenance of appliances and premises by appellee, appellant was seriously and permanently injured when he was completely covered with burning gasoline; as a result, appellant is permanently disabled and disfigured, and has claimed general damages in the sum of One Million Dollars (\$1,000,000.00) in addition to special damages.

Appellee's answer (TR 4) admits that it was and is a Utah corporation, that appellant was an employee of appellee at the time of the accident, and that it was necessary for appellant to secure an as yet undetermined amount of medical care and services for the injuries which he sustained. By virtue of appellee's sixth affirmative defense (TR 6), appellee essentially admits that appellant was in fact injured while acting in the course and scope of his employment by appellee. See California Labor Code §3201 et seq.

Shortly after answering, appellee filed its motion for summary judgment, alleging that it was immune from liability under the F.E.L.A. by virtue of the application of that Act only to "every common carrier by railroad." Appellant emphatically urges that appellee is within the scope of the Federal Employers' Liability Act.

STATEMENT OF THE FACTS

This appeal deals exclusively with appellee's railroading activities. As a result, and because judgment was entered at a very early stage in the litigation, the facts on appeal are basically limited to those showing the nature of appellee's operations.

Appellee (P.F.E.) is "one of the oldest refrigerator car companies" in the United States, "having been organized in 1907" (TR 71) and now has approximately 3700 employees. (TR 34.) At present, and since the time of its organization, its sole stockholders are Union Pacific Railroad Company (U.P.) and Southern Pacific Company (S.P.). (TR 34.) Appellee owns, controls, uses and services the largest fleet of refrigerated freight cars and trailers in the United States, variously estimated at 20,852 refrigerator cars and 2039 trailers (TR 34), 25,300 refrigerator cars, 2730 mechanical cars and 1000 "Ice-Tempco" cars (TR 70), or over 22,500 refrigerator cars, 425 refrigerator trailers and 200 flat cars (TR 71, 73); in any event, appellee owns and operates approximately thirty percent of the refrigerated railroad cars in the nation. (TR 71.)

The use of refrigeration in the interstate transportation of freight by rail is not a new development. According to a mimeographed publication by appellee, "transportation of perishable foodstuffs and other commodities which require protection against heat and cold were handled *by railroads* even as far back as 100 years ago." (TR 71, italics added.) Roughly one mil-

lion carloads of perishable commodities move in the United States every year, and appellee “*originates and otherwise handles* about 285,000 carloads or approximately 28% of the nation’s total”. (TR 71, italics added.) Appellee has the capacity “*to handle* all kinds of perishable foodstuffs and other commodities from *and to* every part of the country.” (TR 71, italics added.)

Aside from the operations already mentioned, appellee maintains and operates five car shops at which freight cars are built and repaired at various locations in the United States; in addition, appellee has light repair and cleaning stations at a number of places throughout the Western part of the United States. (TR 72.) Appellee operates eleven ice manufacturing plants across the nation but also purchases ice from other commercial concerns. (TR 72.) Deliveries of ice are made on railroad tracks owned by appellee, and repairs are accomplished by moving freight cars over tracks owned by appellee by means of locomotives also owned by appellee. (TR 37.) Since June of 1961, appellee has entered the piggyback rail field by acquiring refrigerated vans for the movement of commodities from shipper to terminal; these vehicles do not themselves operate on rails but are carried by railroad on flat cars owned by appellee and then proceed upon the highways from terminal to destination. (TR 73.)

Appellee specializes in what are termed Car Service Operations. “These . . . consist in large part of car

distribution, the furnishing of commodity protective services as ordered by the shipper, and . . . diversion and passing service." Car distribution is the operation that "involves the provision of cars at proper places at the proper times" in condition to transport perishables. Appellee's diversion operations involve the re-routing of freight cars when the shipper calls appellee to request a change in destination; "passing service" refers to appellee's notification to the shipper of the precise location of each of appellee's cars bearing the particular shipper's commodities. (TR 74.)

Appellee, incidentally, has repaired in its shops railroad cars of other companies. Appellee has also leased refrigerated cars directly to shippers on a monthly basis.¹

Appellee operates its railroad equipment within the provisions of the Federal Safety Appliance Act, 45 U.S.C.A. §1 et seq., and the necessary maintenance and repairs have been made both at installations of appellee and at those of other railroad corporations.² Appellee also "files financial data with the Interstate Commerce Commission" (TR 35), and its contract to provide services to S.P. and U.P. was presented to the I.C.C. for approval in 1942.³ Appellee is compensated for the rental of its railway cars at rates vary-

¹These two details were mentioned by Judge Goodman in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651 (N.D. Calif.), aff'd without further opinion, 174 F.2d 1022 (C.A. 9).

²*Pacific Fruit Express Co. v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607.

³*Gaulden*, 78 F.Supp. at 654.

ing from 4.5 to 5.25 cents per mile. (TR 35.) Appellee had net operating income, after deduction of operating and tax expenses, of \$17,700,005 in 1958 and \$18,770,426 in 1959.⁴

The Record contains additional data regarding appellee's operations. In general, appellee claims to be America's "*first family of perishable transportation*" and advises the shipping public to call appellee at its offices in principal cities "*for the finest in perishable transportation service throughout America.*" (TR 70.)

Appellant was injured on November 9, 1963, at appellee's depot in Roseville, California, while employed by appellee. He was operating a motor vehicle owned and maintained by appellee, and because of malfunction by the vehicle appellant was thrown to the ground and his body covered with burning gasoline. (TR 2.) Appellant was, at the time of the accident, engaged in his normal employment for appellee which involved making appellee's freight cars ready for the transportation of perishable commodities. (TR 37.) Appellant has alleged that his injuries were caused by the carelessness and negligence of appellee in the maintenance and operation of its appliances, machines and other equipment, and in its failure to provide appellant with a safe place in which to work.

Summary judgment was granted against appellant in the District Court solely upon the issue of the applicability of the F.E.L.A. to appellee.

⁴Report of the Commission, 318 I.C.C. 132 (re: contracts for protective services).

STATEMENT OF THE ISSUE

The sole issue in this appeal is the responsibility of appellee for personal injuries under the terms of the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., whereby liability attaches to "every common carrier by railroad" in interstate commerce for negligence in the maintenance or operation of "its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

SUMMARY OF ARGUMENT

1. Appellee's business activities are plainly those of a railroad corporation even though its operations may differ in some particulars from those of certain other corporations which are also railroads. The specific facts regarding the details of appellee's facilities and services have never before been presented fully to any court for adjudication, and any prior analysis of appellee's operations is marred by lack of current information.

2. The so-called "express company" cases are inapposite. Appellee must be tested by judicial precedent relating to operations similar to appellee's.

3. The United States Supreme Court has recently provided a modern guide in the construction of the F.E.L.A., and appellee is a railroad corporation under that test. A brief consideration of parallel State legislation also indicates that appellee must be included under the Federal Employers' Liability Act as a common carrier by rail engaged in interstate commerce.

ARGUMENT

I. INTRODUCTION

This appeal deals solely with a close scrutinization of appellee's operations. Appellant recognizes that such a discussion must include reference to the other instances where suit has been brought against appellee under the F.E.L.A. (*Gaulden v. Southern Pacific Company*, 78 F.Supp. 651; *Moleton v. Union Pacific*, Utah, 219 P.2d 1080; *Aguirre v. Southern Pacific*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73.⁵) In contrast to other litigation involving appellee, however, appellant herein has not joined either of appellee's owners in this action. Nor has appellant attempted to impute the operations of appellee's owners to appellee itself. Because there has not been a single reported case involving a personal injury action against P.F.E. which did not also include one or both of its owners as parties defendant, every such prior F.E.L.A. action has suffered from the infusion of questions of agency, contract, employment or joint enterprise.⁶ These analyses share a common weakness: they are prone to engage in a search for *the* railroad—as between appellee or its owners—as if there were some convincing force in the bare fact that appellee commonly works

⁵*Moleton* and *Aguirre* both rest upon *Gaulden* and the cases cited therein. The court in *Aguirre* notes that the facts in all three cases are substantially the same. 232 Cal.App.2d at 645 and 649. Accordingly, the following discussion deals with *Gaulden* only but should be read as applying equally to the other cases.

⁶In *Aguirre*, where both S.P. and U.P. were also defendants, the appellant's briefs dealt in great part with the California statutory times and procedures relating to notice and sufficiency of motions for summary judgment. Appellant's Briefs, 3 Civil No. 10901 (1964).

with railroad companies. In fact, it is not reasonable to contrast appellee's operations solely against a rather limited and archaic concept of railroading; justice compels that the impact of modern authorities be gauged as it bears upon appellee and the F.E.L.A.

This appeal will concentrate upon the actual business of P.F.E. as shown by the Record herein and by other documents of public record. When viewed objectively and apart from its parent corporations, appellee emerges as a common carrier. P.F.E. is the largest owner of refrigerated rail cars in the nation. (TR 71.) It owns tracks, terminal facilities and nationwide servicing, refrigeration, repair and routing installations. (TR 72, 74.) Appellee provides a service inextricably connected with the transportation of perishable freight by railroads since well before the passage of modern railway legislation; however, P.F.E. was not in operation until after the F.E.L.A. was first enacted in 1906. (TR 71.) The services rendered by appellee are of value only to shippers and consumers of perishable commodities and are used only in the actual transportation of such goods. The business of appellee is to "originate and otherwise handle" approximately twenty-eight percent of the rail transportation of refrigerated goods in this country. (TR 71.) Except for the operation of a limited number of highway trailers, appellee confines its operations to dealing with movement of goods by rail.

II. THE FACTS OF THIS CASE ARE BEFORE THE COURT FOR THE FIRST TIME

There are two compelling reasons why *Gaulden v. Southern Pacific Company*, 78 F.Supp. 651, does not control or even bear upon this appeal. First of all, different questions were before the Court in *Gaulden*. Secondly, the nature of appellee's business is now different, and it was not even presented fully to the District Court in 1948.

Appellant herein contends simply that appellee must itself be identified as a common carrier by railroad. In contrast, plaintiff in *Gaulden* based his suit upon the grounds that P.F.E. was the agent of S.P., that S.P. and P.F.E. were engaged in a joint enterprise—making plaintiff an employee of S.P., that the contract between S.P. and P.F.E. violated Section 5 of the F.E.L.A. as an attempt to evade liability by device, and that the 1939 amendment to the Federal Employers' Liability Act "being remedial and humanitarian in purpose, the courts should construe the intent of Congress to include the appellee . . . as a 'Common Carrier by Railroad. . .'" Brief for Appel-

⁷The entirety of appellant Gaulden's argument on the last issue consisted of the following:

Congress by the 1939 amendment to the Federal Employers' Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce and it is respectfully submitted that the Act being remedial and humanitarian in nature the Courts should construe liberally the phrase "common carrier by railroad" so as to include refrigeration car service. (Brief for Appellant, 18.)

The single brief submitted for both appellees therein, although discussing this issue by citing substantially the same authorities contained in appellee's Memorandum of Points and Authorities herein (TR 12-18), places its greatest emphasis upon the relation-

lant, 7-8, 2555 Records of the U.S. Circuit Court of Appeals, Number 12062. The District Court's treatment of this last argument was confined to a comment that these "remedial and humanitarian purposes . . . in no way compel an interpretation of the *contract* in favor of an *employment or agency relationship*" between S.P. and P.F.E. (Italics added.) The treatment of the question of appellee's railroad operations was only secondary and incidental to the "more substantial contention urged by plaintiff" that the contract between appellee and S.P. created an agency relationship.⁸

ship between P.F.E. and S.P. while mentioning only those operations of P.F.E. which are ancillary to the transportation of freight.

Unfortunately, rather than submitting appropriate legal and factual authority bearing upon this issue, appellant Gaulden's Reply Brief specifically excludes the issue of "whether an employee of a refrigerator car company is *per se* an employee of a common carrier by railroad" and instead asserts that P.F.E. was but "the agent of . . . Southern Pacific Company, and not an independent contractor." (Reply Brief, 1-2.)

⁸78 F.Supp. at 654, 656-57. Appellant herein agrees generally with the general position of plaintiff in *Gaulden* and takes issue with many of the conclusions reached by the District Court therein regarding the nature of appellee's operations. That decision appears to rest upon a close scrutiny of commercial relationships rather than upon a consideration of the truly "remedial and humanitarian" nature of all of the legislation in Title 45, U.S.C., for the protection of persons employed in interstate transportation by railroad.

Appellant herein believes that the 1939 amendments to the F.E.L.A. were not intended necessarily to make that Act more humanitarian but rather to reiterate the desire of Congress to exercise plenary remedial powers in interstate commerce after the clarification of its Commerce Clause powers by the United States Supreme Court. For a discussion of the latter decisions, see appellant's Memorandum of Points and Authorities below. (TR 42.) The primary effect of the amendments was to restore the scope of the application of F.E.L.A. to that intended by the framers in 1906.

It is plain that the questions presented for decision in *Gaulden* were removed from any interpretation of the F.E.L.A. by the intervention of contract and agency issues. This is further borne out by the Transcript of Record therein considered as a whole, especially plaintiff's complaint (*Gaulden* TR 2-7) and additional interrogatories (*Gaulden* TR 18-19) which were directed almost exclusively to the intricate connection between S.P. and P.F.E. Manifestly the former corporation provides primarily locomotion while the latter provides essentials such as freight cars, ice, supervision of operations and the like, without which the locomotion furnished by S.P. would be insignificant in interstate commerce. But the question in this appeal is not quantitative; instead, this is a purely qualitative question and must rest exclusively upon an analysis of appellee's railroad operations alone.

Gaulden in reality can stand only for the proposition that the *contract* between S.P. and appellee did not expose appellee's owners to F.E.L.A. liability for injuries to appellee's employees on the basis of agency, joint enterprise or fraud. Insofar as that decision might purport to go farther, it cannot be viewed as reliable authority since neither sufficient facts nor proper legal authorities were before the courts at that time. The facts presently before this Court are different in many crucial respects from those recited in the *Gaulden* opinion notwithstanding the fact that the same appellee is involved. Some of the details recited in *Gaulden* must also be seen as

taking on additional significance when read in conjunction with the Transcripts of Record herein and in *Gaulden*.

As of May, 1965, appellee's publications available to the public⁹ indicated ownership by appellee of twenty-five thousand three hundred refrigerator cars, 2730 mechanical cars, and 1000 "Ice-Tempco" cars, making appellee the "nation's largest operator of refrigerated rail cars."¹⁰ Readers of this publication are further advised that

TEMPCO-VANS, the most modern trailers designed especially for combination highway and piggyback operation, are the latest addition to PFE's *first family of perishable transportation*. . . Shippers and consignees want their shipments

⁹See Declaration of Leland P. Jarnigan. (TR 69.) The materials attached thereto and made a part of the Record (Tr. 70-76) are informally obtained advertising literature but would nonetheless be admissible against appellee upon trial of this action. F.R.C.P. 43(a); California Code of Civil Procedure, Section 1870(2); see also California Evidence Code, Sections 1220-1222, effective January 1, 1967. As such, and because they have been included without objection in the Record, they must be considered in this appeal as containing statements which can properly be used against appellee.

The mimeographed narrative describing appellee's operations bears the notation "Office of Vice President & General Manager/San Francisco, California/March 1, 1963" (TR 75) and incorporates certain photographs (TR 76), although it is not otherwise apparent when these documents were prepared.

¹⁰The same publication also refers to "TEMPCO-VAN SERVICE" involving P.F.E.'s ownership of 400 refrigerated highway trailer-containers and 200 Piggyback rail flat cars. (TR 70.)

"Ice-Tempco" refers to the presence in the freight cars of "units for constant operation of air-circulating fans while under load to produce controlled temperatures." (TR 73.) This further shows that appellee is closely concerned with the actual transportation of goods and has not completed its services with the mere loading of ice into a boxcar.

transported speedily and smoothly *and delivered to the market in top condition*. . . . A refrigerated trailer must do more than just transport and refrigerate. . . . (TR 70-71.)¹¹

It is clear that appellee holds itself out to the public as providing transportation and delivery of freight and that P.F.E. in fact is concerned with far more than providing a private service to other railroads. To serve the shipping public directly, appellee possesses "offices and agencies in all principal Western producing areas" and in "all major receiving and consuming areas." Appellee gives "complete diversion and passing advice service" and employs "specialized personnel to serve the perishable shipping and receiving trade." (TR 70.) A random sampling reveals that P.F.E. is listed in the 1966 classified telephone directories of San Francisco, California (page 761), and Omaha, Nebraska (page 333), under the heading "Railroad Companies", and of Chicago, Illinois (page 1650), under the heading "Railroads".

It would be grossly incorrect to view appellee's business as a static enterprise limited to putting ice into freight cars and repairing the cars which it owns. Yet this is the posture which appellee has taken when-

¹¹The italics have not been added but, strangely, appear in the publication as provided by appellee, thereby emphasizing P.F.E.'s actual involvement in the interstate transportation of freight.

The mimeographed narrative also indicates that "in June, 1961, P.F.E. acquired several million dollars worth of refrigerator trailers for use in the piggyback rail field." (TR 73.) This therefore represents a change in appellee's operations since *Gaulden*, although the affidavit submitted herein by appellee does not discuss this aspect of its operations in any detail. (TR 34-38.)

ever the F.E.L.A. looms large. It was perhaps for this reason that the *Gaulden* opinion describes appellee in the following terms:

The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. . . . The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company . . . [which] transacts none of its protective service business directly with the shippers. 78 F. Supp. at 654.

A different picture entirely is seen in appellee's own description of its business in 1963, the same year in which appellant sustained his injuries:

. . . it is now possible safely to handle all kinds of perishable foodstuffs and other commodities from and to every part of the country. About 1,000,000 carloads of such commodities move in the United States in the course of a year, and this Company originates and otherwise handles around 285,000 carloads or approximately 28% of the nation's total. . . . (TR 71.)

. . . close to 1,300,000 tons [of ice] annually . . . is issued to the ice compartments in the ice bunker cars as they travel toward their destination with their precious loadings of fruit, vegetables and other foodstuffs and miscellaneous perishable commodities. (TR 72.)

[The refrigerator trailers and cars] are used for frozen foods as well as fresh fruits and vegetables and add to the many other features of PFE service the convenience of pick-up and delivery. (TR 73-74.)

These latter [car service] operations consist in large part of car distribution, the furnishing of commodity protective services as ordered by the shipper, and what is referred to in railroad terminology as diversion and passing service.

. . . car distribution is an operation that involves the provision of cars at proper places at the proper times and in condition that will permit the safe transport of products to points of use. (TR 74.)

. . . if after valuable produce is loaded into a car and it is started on its way to the consuming center, . . . it is learned that another area has better demand and offers a better price, the shipper will call us on the telephone and request that we "divert" the car from its originally billed destination to the new destination. . . . In handling some 285,000 carloads of perishables a year we are called upon by shippers to accomplish in the neighborhood of 170,000 diversions a year. . . . We have sizable diversion forces at Chicago . . . [which] are aware at all times where each and every loaded car may be and we keep shippers informed when their shipments "pass" certain points, and this is what we mean when we speak of "passing service." (TR 74-75.)

All of the rolling stock illustrated clearly bears appellee's name, while the insignia of appellee's owners appear in subordinate detail. Most significantly, the public is exhorted to contact appellee directly "for the finest in perishable transportation service throughout America" since appellee, in addition to S.P. and U.P., maintains "offices in principal

cities to supply your needs fast—wherever you are.” (TR 70.)

Thus the shipper specifies to appellee, apparently either in writing or by telephone, the type of service desired. The shipper may also change the type of service originally requested in the same manner. The shipper may obtain from appellee the location of each car carrying perishables and may reroute any of its cars simply by calling appellee. Appellee originates, supervises and actually controls the movement of goods throughout the United States. It cannot now insist that it does not deal directly with the shipping public. P.F.E. is in fact intimately connected with the carriage of perishable freight by rail and does not engage in a single major non-railway operation.

The affirmative details regarding appellee’s operations as set forth in *Gaulden* should not be ignored. Appellee does indeed furnish “reefers” to other railroads, rents some directly to shippers, heats and cools freight cars, owns tracks and terminals, repairs and services freight cars, and owns locomotives. From appellee’s affidavit herein (TR 37) it also appears that appellee moves railroad cars with its own locomotives as needed “for the furnishing of protective services.”

Within any reasonable construction of the phrase, appellee plainly “controls the movement of ‘reefers’ . . . beyond its icing docks and plants”, and the statement to the contrary in *Gaulden* is clearly erroneous. 78 F.Supp. at 653. Regardless of the source of the factual weakness of *Gaulden*—whether due to the lim-

ited and slanted description by the appellees of their operations, or to the failure of appellant therein to pursue an inquiry into the true nature of appellee's activities, or even to the recent expansion of appellee's operations during the past twenty years—that opinion does not represent a fair or thorough evaluation of P.F.E. and is not determinative of appellee's status under Federal legislation. The true nature of appellee's operations is now clear and requires that appellee be held accountable under the F.E.L.A. for negligence regarding its cars, appliances, machinery or other equipment.

III. OPERATIONS SIMILAR TO APPELLEE'S HAVE ALREADY BEEN CLASSIFIED AS COMMON CARRIERS BY RAILROAD

The *Gaulden* opinion and appellee's Motion for Summary Judgment rested upon *Wells Fargo v. Taylor*, 254 U.S. 175 (1920), an archaic and devitalized decision in the realm of F.E.L.A. litigation.¹² That decision upheld the validity of an employment contract exonerating an express company from liability for personal injuries in spite of explicit Congressional direction to the contrary.¹³ To accomplish this, the

¹²Appellant has included in the Transcript of Record all of the documents submitted in opposition to the Motion for Summary Judgment. Appellant's Memorandum (TR 40 et seq.) devotes substantial attention to *Wells Fargo*, and the argument will be abbreviated herein. Reference should be had to the Memorandum for further discussion on all of the legal issues involved herein.

¹³The House Committee on the Judiciary, in referring out the F.E.L.A. in 1908 as a bill relating "to common carriers by railroad" intended "in its scope to cover all commerce to which the

court deliberately placed the narrowest—and most circular—construction possible upon the words “common carrier by railroad”: “one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier.”¹⁴ None of the language of *Wells Fargo* is in the least inconsistent with inclusion of appellee under the Federal Employers’ Liability Act. Fundamentally, Wells Fargo did not own the appliances or engage in the business of railroading.

Congress in 1906, in amending one of the nation’s most comprehensive legislative programs, provided a practical definition of applicable language in the Interstate Commerce Act. 49 U.S.C.A. §1 et seq. The I.C.A. applies, *inter alia*, to “any common carrier . . . engaged in the transportation of passengers or property wholly by railroad . . .” and includes all instrumentalities used in the transportation of persons or goods by rail within the term “railroad.” “Transportation” as

regulative power of Congress extends”, expressed the specific intention to render void “any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act.” 45 U.S.C.A. §55. Specific reference was made to the fact that

. . . employees of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company

A copy of this Report is included in the Record herein. (TR 50-54.)

¹⁴The court later made reference to “cars, engines, track, road-bed and other property pertaining to a going railroad” (an incomplete reference to the language of 45 U.S.C.A. §51) and also referred to the language of the Safety Appliance Act, 45 U.S.C.A. §§3 and 4, “requiring engines and cars to be equipped with” certain safety equipment.

used in the I.C.A. specifically includes "refrigeration or icing".¹⁵ Although the F.E.L.A. *per se* does not define its terms, it uses references to railroad equipment which are strikingly similar to the I.C.A. language. Furthermore, the close relationship between Title 49 and Title 45 is illustrated by the fact that the Railway Labor Act, 45 U.S.C.A. §151 et seq., specifically adopts the same definition of common carrier as in the Interstate Commerce Act. With only minor variation in specific words, the same broad concept of common carrier, transportation and railroad appears in every Act in Titles 45 and 49 defining or explaining those terms. Cf. Railroad Retirement Act, 45 U.S.C.A. §228, and the Railroad Unemployment Insurance Act, 45 U.S.C.A. §351, for examples.

The Federal Safety Appliance Act, 45 U.S.C.A. §1 et seq., is the link between the Interstate Commerce Act and the Federal Employers' Liability Act. The Safety Appliance Act has been held to be at least as broad in its application as the I.C.A. but is not limited by any requirements of the latter regarding "a continuous carriage or shipment." *Pacific Coast Ry. Co. v. United States*, 173 Fed. 448 (C.C.A. 9). The safety appliance statutes are basically *in pari materia* with the F.E.L.A., may be seen as amend-

¹⁵The Interstate Commerce Act is relevant to this discussion if for no other reason than the fact that the Court in *Wells Fargo* singled out the "similar words in the original" Act which had been construed "as including carriers operating railroads but not express companies doing business as here shown." 254 U.S. at 187. This ignored the explicit Congressional action of 1906 adding express companies to the paragraph defining railroad terms. 34 Stats. 584.

ments thereto, and definitely serve to expand the rights and protection given to persons employed in interstate commerce. *Urie v. Thompson*, 337 U.S. 163 (1949). In fact 45 U.S.C.A. §23 (Boiler Inspection Act) gives the I.C.C. rule-making power to protect employees in railway operations. *Urie*, 337 U.S. at 193. It is axiomatic that when Congress acts it legislates to the full extent of its Constitutional authority unless it specifically elects otherwise. This is especially true in legislation under the Commerce Clause of the Constitution. (See TR 42-43 for discussion of Commerce Clause cases.) In the absence of direct and specific indications to the contrary, it must reasonably be concluded that Congress has intended in its railroad legislation to utilize its plenary power to protect and nourish interstate commerce "no matter what the source of the dangers which threaten it." *Mondou v. New York, N.H.&H.R. Co.*, 223 U.S. 1, 51 (1912), the second F.E.L.A. cases; see generally *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Express companies such as Wells Fargo have subsequently been recognized and classified as common carriers, and any exclusion of the application of the F.E.L.A. arises from their lack of railroad appliances and facilities rather than from any shortage of transportation activities in interstate commerce. *Fleming v. Railway Express Agency*, 161 F.2d 659 (C.C.A. 7); *Jones v. New York Central*, 182 F.2d 326 (C.A. 6). Express companies are usually engaged in the business of short-distance movement of freight, including

delivery to and receipt of goods from other carriers. But their operations do not customarily involve owning, servicing or operating railroad equipment *per se*. See *Pacific Express Co. v. Seibert*, 44 Fed. 310 (W.D. Mo.); *Alsop v. Southern Express Co.*, 104 N.C. 278, 10 S.E. 297, 6 L.R.A. 271; *Pfister v. Central Pacific Ry. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am.Rep. 404. Even with the limited nature of express company operations, the court in *Fleming*, *supra*, has no hesitation in holding that

a common carrier is one who, for hire, engages in transporting commodities from one place to another, or in connection with another carrier, such as a railroad. It does not step outside its common carrier status because it only renders part, though a necessary part, of a transportation service, or because it renders its service as an agent of a common carrier. 161 F.2d at 661.

The *Fleming* decision included express companies as common carriers under the rationale of the terminal company cases, *infra*.

A terminal company ordinarily prepares, services, supervises and occasionally operates railroad equipment between journeys and does not usually act upon the equipment while actually crossing State lines.¹⁶ See *Fort Street Union Depot Company v. Hillen*, 119 F.2d 307 (C.C.A. 6); *McCullough v. Jacksonville Terminal Co.*, Fla.App., 176 So.2d 345. Because of the interrelation between terminal companies and rail-

¹⁶See appellant's Memorandum (TR 45-49) for further discussion of the terminal company cases.

roads in interstate commerce, the terminal operations have been included within requirements of the Interstate Commerce Act, *Union Stockyard v. United States*, 308 U.S. 213 (1939); the Hours of Service Act, *United States v. Brooklyn Eastern District Terminal Co.*, 249 U.S. 296 (1919), *Bush v. Brooklyn Eastern District Terminal Co.*, 218 N.Y.S. 516, 218 App.Div. 782; the Federal Safety Appliance Act, *McCullough v. Jacksonville Terminal Co.*, *supra*; 176 So.2d 345; and, most importantly, the Federal Employers' Liability Act, *Fort Street Union Depot Company v. Hillen*, *supra*, 119 F.2d 307; *McCabe v. Boston Terminal Co.*, 303 Mass. 450, 22 N.E.2d 33. These terminal companies generally owned no railroad cars and rendered no services directly to the public. Yet their activities have been sufficiently related to railroading to classify these companies as common carriers engaged in railroad operations.

Appellee is certainly more a common carrier by railroad than is a terminal company. Aside from rendering services, P.F.E. owns cars, two engines, tracks, plants and facilities, and moreover holds itself out to the public as providing "the finest in perishable transportation service throughout America." (TR 70.) Even if appellee acts in part through others, that does not alter the determination that P.F.E. is a common carrier by railroad. *Eddings v. Collins Pine Company*, 140 F.Supp. 622 (N.D.Calif.), holding that a lumber company substantially "operated" a railroad, even though it did not in fact own any of the equipment, and was therefore liable under the F.E.L.A.

IV. APPELLEE IS A COMMON CARRIER BY RAILROAD UNDER APPLICABLE MODERN GUIDELINES

Perhaps the clearest method of demonstrating appellee's status as a common carrier by railroad is to examine its operations in terms of the language of the United States Supreme Court in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 185 (1964):

Consisting of about 50 miles of railroad tracks in the area adjacent to the State Docks at Mobile, it serves those docks and several industries situated in the vicinity, and also operates an interchange railroad with several privately owned railroad companies. It performs services for profit It conducts substantial operations in interstate commerce. It has contracts and working agreements with the various railroad brotherhoods . . . ; maintains its equipment in conformity with the Federal Safety Appliance Act . . . ; and complies with the reporting and bookkeeping requirements of the Interstate Commerce Commission. It is thus indisputably a common carrier by railroad engaging in interstate commerce.

A company is therefore subject to the F.E.L.A. if it (1) owns tracks, (2) provides services to other commerce located near its facilities, (3) operates in conjunction with other railroads, (4) performs its services for profit, (5) acts in interstate commerce, (6) has contracts with railroad brotherhoods, (7) complies with the safety appliance acts and regulations, and (8) handles its bookkeeping pursuant to the regulations of the I.C.C. Appellee falls within every one of the enumerated standards of the *Parden* decision.

P.F.E. owns tracks, as well as engines, terminals and the largest fleet of refrigerated freight cars in the United States. See, for example, TR 37, 71.

Appellee, as discussed earlier, devotes its entire operation to direct and indirect services to shippers of perishable commodities, moves railroad cars for icing operations, directs the movement of cars in transit and provides complete service for the pick-up, movement and delivery of perishables.

“PFE has formal written contracts to render protective services to a number of railroads”. (TR 32.) The Record reflects the fact that these services are rendered on a nation-wide basis. Moreover, as has been indicated earlier, appellee deals directly with both shippers and railroads in the rerouting of perishable freight while it is in transit. The lack of substantial locomotive power cannot be considered an essential shortcoming in view of the terminal company cases; nor is it significant that appellee does not connect other rail lines since it is quite conceivable that a railroad could operate exclusively upon its own tracks.

Appellee is compensated for its services and is presumably intended to be a profit making corporation. (TR 35-36.)

Appellee unquestionably acts in and on interstate commerce and has apparently never denied that aspect of its activities.

The affidavit filed by appellee in *Gaulden* stated that most, if not all, nonmanagerial employees of P.F.E. “belonged to labor unions (sometimes referred

to as Brotherhoods) and P.F.E. had collective bargaining agreements with said unions. . .".¹⁷ 2555 Records of the U.S. Court of Appeals, Number 12062, TR 34.

Appellee's freight cars have been found to receive "those repairs necessary to meet requirements of the federal safety appliance acts and regulations thereunder and to keep cars in suitable condition for efficient and satisfactory operation. . . ." *Pacific Fruit Express Co. v. McColgan*, 67 Cal.App.2d 93, 97, 153 P.2d 607. This comes as no surprise since the Safety Appliance Act, 45 U.S.C.A. §1 et seq., was amended in 1903 to embrace "all trains, locomotives, tenders, cars" and like equipment "used on any railway engaged in interstate commerce" and to the other facilities and equipment "used in connection therewith." 32 Stat. 943.

Appellee is subject to the reporting and bookkeeping requirements of the Interstate Commerce Commission as shown by the statement in appellee's affidavit herein that it "files financial data" with the Commission, and the I.C.C. can require such data and can prescribe the form of accounts used by P.F.E. (TR 35.) Appellee's contract with U.P. and S.P. was filed with the I.C.C. for approval in 1942. *Gaulden, supra*, 78 F.Supp. at 654. It also appears that the I.C.C. has additional authority to conduct hearings regarding the

¹⁷Although not in the Record, appellee still deals with a railroad clerical brotherhood of which appellant was a member at the time of the accident. If the court deems it necessary, the Record herein can be augmented to add evidence of these facts.

type of service furnished by P.F.E. and other such companies. See Report of the Commission, 318 I.C.C. 111, 120-121.

CONCLUSION

Both the terminal company cases and current reasoning under the F.E.L.A. require that appellee be included with that Act. There can be no doubt that appellee is a common carrier. Equally surely, appellee operates almost exclusively by railroad, to a greater extent than the terminal companies. Lastly, P.F.E. is undeniably engaged in interstate commerce.

Appellee cannot be heard to claim that it is exempt from the federal legislation involved herein. If appellee were so exempt and immune, then *a fortiori* it would come within the scope of parallel State legislation. A brief glimpse at applicable California statutes, however, shows clearly that this State would consider appellee as subject to federal railway acts.

California Public Utilities Code §229 includes all tracks, depots, yards, grounds, terminals and terminal facilities, and all other equipment used in rail transportation within the term "railroad". Public Utilities Code §230 defines a "railroad corporation" as every corporation which owns, controls, operates or manages any railroad in this State. Moreover, every such railroad corporation in California is a "common carrier" as defined by statute. California Public Utilities Code

§211. By definition, appellee is also a "public utility" in California. Public Utilities Code §216(c).¹⁸

Appellee "does not report to the California Public Utilities Commission, nor to any other state utilities commission." (TR 35.) The California Public Utilities Act is made explicitly inapplicable to interstate commerce operations. Public Utilities Code §202. This explains why appellee, a public utility and railroad corporation by California standards, is exempted from State control. However, such exemption must reasonably mean that appellee has the correlative responsibilities under Federal legislation.

Substance, not form, must determine which statutes apply to P.F.E. As expected, appellee minimizes its direct activities in the carriage of goods. It must be borne in mind, however, that on a Motion for Summary Judgment the moving party is not entitled to draw favorable inferences from his moving papers. *Cochran v. United States*, 123 F.Supp. 362 (D.C. Conn.) The matters presented in connection with the motion must be construed most favorably to appellant herein. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). The Record as a whole clearly established the fact that appellee's operations are much more extensive than assumed previously. This being the case, appellee should no longer be allowed to retreat behind its contract with S.P. and U.P. In *Gaulden* and the

¹⁸For examples of similar State legislation in the Ninth Circuit, see Arizona Constitution, Art. 15, §10; Idaho Code Annotated, §61-113, §61-107; Montana Revised Code Annotated §§72:114, 72:115; Nevada Revised Statutes §704.020; Oregon Revised Statutes §760:010.

succeeding cases, P.F.E. was an employment shield between an injured worker and S.P. or U.P. It must not now be allowed to assert that its operations are performed by other railroads.

Appellant respectfully submits that the District Court erred in granting judgment for appellee and urges that this matter be remanded for trial upon the merits.

Dated, San Francisco, California,

November 28, 1966.

JACK H. WERCHICK,
ARNE WERCHICK,
WERCHICK & WERCHICK,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARNE WERCHICK,
Attorney for Appellant.

No. 21020

In the

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,

Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY, a Utah
Corporation,

Appellee.

Appellee's Brief

ALAN C. FURTH
JOHN J. CORRIGAN
DONALD O. ROY

65 Market Street
San Francisco, California 94105

Attorneys for Appellee

FILED

APR 14 1967

WM B LUCK CLERK

201967

SUBJECT INDEX

	Page
Statement of Jurisdiction.....	1
Statement of the Case.....	2
Summary of Argument.....	3
Argument	3
I. Congress and the Courts have consistently recognized refrigerator car companies as conducting a business distinct from that of a common carrier by railroad and not subject to the Federal Employers' Liability Act.....	3
II. There are no significant factual changes in appellee's operations from that shown in prior adjudications holding appellee and other refrigerator car companies as not being subject to the Federal Employers' Liability Act	11
III. Neither terminal company cases nor cases from other activities closely related to railroading provide good authority for the decision of this case.....	17
Conclusion	18
Certificate of Counsel	20

TABLE OF AUTHORITIES CITED

CASES	Pages
Aguirre v. Southern Pac. Co., 232 Cal.App.2d 636; 43 Cal. Rptr. 73	6, 13, 18
Chicago Refrigerator Co. v. I.C.C., (1923) 265 U.S. 292, 44 S. Ct. 558, 68 L.Ed. 1024.....	14, 15
Ellis v. Interstate Commerce Commission, 237 U.S. 434; 355 Sup. Ct. 645; 59 L.Ed. 1036.....	9, 13
Gaulden v. Southern Pac. Co., 78 F.Supp. 651 (N. D. Calif. 1948), aff'd 174 F.2d 1022 (9th Cir. 1949).....	4, 6, 7, 11, 12, 13, 15, 17, 19
Hetman v. Fruit Growers Express Co., 346 F.2d 947 (3rd Cir. 1965)	6, 17
Jones v. New York Cent. R. R. Co. (6th Cir. 1950); 182 F.2d 326	4
Latsko v. National Carloading Corp., 192 F.2d 905 (7th Cir. 1951)	4
Moleton v. Union Pac. R. R. Co., 118 Ut. 107, 219 P.2d 1080, cert. den'd; 340 U.S. 932, 71 Sup.Ct. 495; 95 L.Ed. 672.....	6
Parden v. Terminal Railroad of Alabama Docks Department, 377 U.S. 184, 84 Sup. Ct. 1207, 12 L.Ed.2d 233.....	17
Poss v. Lieberman, 299 F.2d 358, (2nd Cir. 1962) cert. den'd; 370 U.S. 944; 82 Sup.Ct. 1585; 8 L.Ed.2d 810.....	3
Robinson v. Baltimore & Ohio R. R. Co. (1914); 237 U.S. 84; 35 Sup. Ct. 491, 59 L.Ed. 849.....	4
United States v. Fruit Growers Express, 279 U.S. 363; 49 Sup. Ct. 374; 73 L.Ed. 739.....	10
Wells Fargo & Co. v. Taylor, (1920) 254 U.S. 175; 41 Sup.Ct. 93; 65 L.Ed. 205.....	4

TABLE OF AUTHORITIES CITED

iii

STATUTES	Pages
Federal Employers' Liability Act:	
35 Stat. 65, 45 U.S.C. § 51 et. seq.....	2, 3, 9
Interstate Commerce Act:	
24 Stat. 379, 49 U.S.C. § 1 et seq.....	9
Judiciary and Judicial Procedure:	
28 U.S.C. § 1291.....	1, 3
28 U.S.C. § 1331.....	1
Railroad Retirement Act:	
45 U.S.C. § 228.....	7, 8
49 Stat. 967.....	8
Railroad Retirement Tax Act:	
Internal Revenue Code of 1954 § 3231.....	7, 8
Railroad Unemployment Insurance Act:	
45 U.S.C. § 351.....	7, 8
Railway Labor Act:	
44 Stat. 577.....	7
48 Stat. 1185, 45 U.S.C. § 151.....	7

RULES

Federal Rules of Civil Procedure:	
Rule 56	16
Rule 73	3

No. 21020

In the

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,

Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY, a Utah
Corporation,

Appellee.

Appellee's Brief

STATEMENT OF JURISDICTION

Jurisdiction of this court rests upon 28 U.S.C. § 1291,
reading in part as follows:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States”

Jurisdiction of the district court rested upon 28 U.S.C. § 1331, reading in part as follows:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.”

and upon the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51, et seq. (1952), and in particular upon § 56 of the act providing in part, "Under this chapter an action may be brought in a district court of the United States..."

Appellant's complaint in the district court alleges appellee is "a common carrier by Railroad within the meaning of Title 45 U.S.C. 51 . . ." (Transcript of Record, hereinafter T.R., p. 1) alleges employment of appellant (T.R. 1), alleges injury to him through the fault of Appellee (T.R. 2), and alleges damages of \$1,000,000. (T.R. 3).

STATEMENT OF THE CASE

The question involved is: Is appellee, Pacific Fruit Express Company, a common carrier by railroad engaging in interstate commerce within the meaning of the Federal Employers' Liability Act?

The question is raised in the following manner:

Complaint was filed November 24, 1965, (T.R. 1) alleging appellee's status as a common carrier by rail subject to the Federal Employers' Liability Act. Answer was filed January 7, 1966, (T.R. 4) denying such status and the charging allegations of the complaint. Defendant filed a motion for summary judgment on January 20, 1966. (T.R. 10) The motion was supported by an affidavit showing the nature and function of appellee's business as a refrigerator car company and showing its corporate status and lack of function as a rail common carrier. (T.R. 34). The motion was heard by the Honorable Albert C. Wollenberg and summary judgment granted March 18, 1966, and entered March 23, 1966. The summary judgment finds "That the defendant Pacific Fruit Express Company was not at the time of plaintiff's injury a common carrier by railroad subject to

the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq."

Such a summary judgment is a final judgment within the meaning of 28 U.S.C. § 1291, the statute conferring jurisdiction on this Court. *Poss v. Lieberman*, 299 F.2d 358, (2nd Cir. 1962) *cert. den'd*; 370 U.S. 944; 82 Sup.Ct. 1585; 8 L.Ed.2d 810.

Appellant's Notice of Appeal was filed April 7, 1966, within the time allowed for taking an appeal. Fed. R. Civ. P. 73.

SUMMARY OF ARGUMENT

I. Congress and the Courts have consistently recognized refrigerator car companies as conducting a business distinct from that of a common carrier by railroad and not subject to the Federal Employers' Liability Act.

II. There are no significant factual changes in appellee's operations from that shown in prior adjudications holding appellee and other refrigerator car companies not subject to the Federal Employers' Liability Act.

III. Neither the Terminal Company cases nor cases from other activities closely related to railroading provide good authority for the decision of this case.

ARGUMENT

I. Congress and the Courts have consistently recognized refrigerator car companies as conducting a business distinct from that of a common carrier by railroad and not subject to the Federal Employers' Liability Act.

In construing the Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U.S.C. § 51 et. seq. (1952), the courts have consistently recognized that certain areas of activity while closely related to railroading, are yet not the business of a common carrier by rail and not subject to the Federal

Employers' Liability Act. Examples of these areas are sleeping car companies, *Robinson v. Baltimore & Ohio R. R. Co.* (1914); 237 U.S. 84; 35 Sup.Ct. 491, 59 L.Ed. 849; express companies, *Wells Fargo & Co. v. Taylor*, (1920) 254 U.S. 175; 41 Sup.Ct. 93; 65 L.Ed. 205; *Jones v. New York Cent. R. R. Co.* (6th Cir. 1950); 182 F.2d 326; freight forwarders, *Latsko v. National Carloading Corp.*, 192 F.2d 905 (7th Cir. 1951).

The seminal case on refrigerator car companies is *Gaulden v. Southern Pac. Co.*, 78 F.Supp. 651 (N. D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949), a decision by the Honorable Louis Goodman. So far as appellee is able to discover this is the first case expressly considering the status of refrigerator car companies under the Federal Employers' Liability Act. In that suit for personal injuries plaintiff, an iceman employed by Pacific Fruit Express Company, sought to maintain an action under the Federal Employers' Liability Act against both his employer the Pacific Fruit Express Company, and Southern Pacific Company, a railroad common carrier and one of the two stockholders of Pacific Fruit Express Company. The accident happened at the icing yard and plant owned and operated by Pacific Fruit Express Company at Bakersfield. After a thorough review of all factors which distinguish Pacific Fruit Express Company from a railroad common carrier (e.g. lack of control of the movement of refrigerator cars, possession of no rail motive power, ownership of shop tracks and unloading tracks only, etc.), the court gives specific consideration to whether a refrigerator car company is a common carrier by railroad within the Federal Employers' Liability Act. The Court analyzes the problem with such clarity that this portion of the opinion is here set forth in full.

“Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers’ Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 U.S.C.A. § 51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a common carrier by railroad. *Ellis v. Interstate Commerce Commissioner*, 237 U.S. 434, 35 S.Ct. 645, 59 L.Ed. 1036; *United States v. Fruit Growers Express Co.*, 279 U.S. 363, 49 S.Ct. 374, 73 L.Ed. 739; *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205; *United States ex rel. Chicago Refrigerator Company v. Interstate Commerce Com.*, 265 U.S. 292, 44 S.Ct. 558, 68 L.Ed. 1024; *Reynolds v. Addison Miller Co.*, 143 Wash. 271, 255 P. 110.

“The Federal Employers’ Liability Act was amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e. acquiescence in the judicial rulings. Federal legislation concerning the social security of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier, thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act.” (pp. 654-55)

This express consideration of whether refrigerator car companies are within the Federal Employers' Liability Act is in direct contradiction to the assertion at the top of page 10 of Appellant's Opening Brief (hereinafter "brief") that "different questions were before the Court in *Gaulden*".

Judge Goodman's analysis and opinion in *Gaulden* have proved so outstanding and persuasive that every court considering the problem since has not only arrived at the same result, but either in part or in whole adopted the *Gaulden* opinion as its own. These courts include the following:

(1) This court, which in a *per curiam* opinion, affirmed the judgment on the grounds and for the reasons stated in the opinion of the trial court. 174 F.2d 1022 (9th Cir. 1949).

(2) The United States Court of Appeals for the Third Circuit in *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965). In this F. E. L. A. action decedent was an employee of an independent contractor performing icing services for the defendant refrigerator car company. One of the questions raised was whether the defendant was "a common carrier by railroad." The Court answers, no, and affirms the action of the trial court in granting summary judgment for defendant.

(3) The Courts of California in *Aguirre v. Southern Pac. Co.*, 232 Cal.App.2d 636; 43 Cal.Rptr. 73. A summary judgment was also affirmed on appeal in this case. Plaintiff was an employee of appellee at Roseville. The Court gives express consideration to whether P. F. E. is a common carrier by rail (p. 643) and on the basis of its own consideration of the authorities concludes it is not.

(4) The Supreme Court of Utah in *Moleton v. Union Pac. R. R. Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. den'd*; 340 U.S. 932, 71 Sup.Ct. 495; 95 L.Ed. 672. This case was dismissed in the trial court on a non-suit and affirmed on appeal. Plaintiff was an employee of P.F.E.

Co. at Laramie, but working in the yards of Union Pacific R. R. Co. The court holds P. F. E. is not a common carrier by rail within the meaning of the Federal Employers' Liability Act.

So far as appellee knows these are all the cases and opinions in which the question raised is the status of refrigerator car companies under the F. E. L. A. They adopt *Gaulden* and arrive at the same result, and there are no decided cases holding a refrigerator car company subject to the Federal Employers' Liability Act.

Since the *Gaulden* opinion has been so influential, it may be well to amplify and expand certain of the considerations there set forth. It is important to note, as Judge Goodman points out, that in the few years immediately preceding the 1939 amendments to the Federal Employers' Liability Act, Congress enacted the Railway Labor Act, 45 U.S.C. § 151 (1926), the Railroad Retirement Act of 1937, 45 U.S.C. § 228(a) (1937), the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 (1938), and the Railroad Retirement Tax Act (1937), Internal Revenue Code of 1954, Section 3231.

As to the Railway Labor Act, as originally enacted its coverage did not specifically include refrigerator car companies. Railway Labor Act § 1, ch. 1 § 1, 44 Stat. 577 (1926). In 1934, the act was amended; Section 1, which contains definitions, was amended adding the wording "any company . . . which operates any equipment or facilities or performs any service . . . in connection with the . . . refrigeration or icing . . . of property transported by railroad . . ." 48 Stat. 1185, (1934) 45 U.S.C. § 151. Congress thus explicitly recognized refrigerator car companies as a distinct type of activity. Moreover, Congress recognized that if this type of activity were to be included within the Railway Labor Act

it would have to be by way of amendment and Congress indicated its willingness to proceed in this manner.

In 1934 Congress not only amended the Railway Labor Act, but also enacted the Railroad Retirement Act of 1934 (48 Stat. 1283). The definition of "carrier" contained in that year's amendment to the Railway Labor Act was carried over in its entirety to the definition of "employer" found in Section 1 of the Retirement Act, including the reference to companies performing services in connection with refrigeration or icing. The 1934 Retirement Act, however, was held unconstitutional. Congress then separated the retirement and taxing provisions in the Act in an effort to overcome the constitutional objection. Two statutes were passed incorporating essentially the same definition of employer, the Railroad Retirement Act (1935), 49 Stat. 967, and the Carriers' Taxing Act, 1935, 49 Stat. 974, both with language as above specifically including refrigerator car companies. The 1935 Taxing Act was also held unconstitutional. In 1937 Congress passed the present Railroad Retirement Act 45 U.S.C. § 228 and Railroad Retirement Tax Act, Internal Revenue Code of 1954 § 3231, both of which specifically included refrigerator car companies.

The Railroad Unemployment Insurance Act, 45 U.S.C. § 351, was passed in 1938 and the relevant definitions and coverage are identical to those contained in the Retirement Acts just reviewed.

Thus between 1934 and 1938, the year before the Federal Employers' Liability Act was amended, Congress passed six major items of legislation (including bills repealed or held unconstitutional) and passed an amendment to an existing major statute (the Railway Labor Act) in all of which refrigerator car companies are specifically included and all of which such companies are recognized as a separate, distinct type of activity.

In 1939 the Federal Employers' Liability Act was amended and its scope considerably expanded. Ch. 685 § 1 (1939), 35 Stat. 65. At that time Congress considered expanding the Act to include some of the areas closely related to railroading, in that the amendment originally proposed broadening the coverage of the act to include express, freight forwarding, and sleeping car companies. The report of the Senate Judiciary Committee states:

“Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act.”

They were therefore excluded. It is to be emphasized that there was no attempt to include refrigerator car companies at this time. The history of the 1939 amendment to the Federal Employers' Liability Act thus discloses both Congressional disinclination to extend the coverage of the act and the lack of any demand or expression of need that it be extended to refrigerator car companies.

The history of judicial construction and statutory amendment of the Interstate Commerce Act 24 Stat. 379 (1887), 49 U.S.C. § 1 et seq. is likewise illuminating. Appellant has urged the similarity of language between the Interstate Commerce Act and the Federal Employers' Liability Act. (P. 19 Brief). In 1914 in *Ellis v. Interstate Commerce Commission*, 237 U.S. 434; 355 Sup. Ct. 645; 59 L.Ed. 1036 the question raised was whether Armour Car Lines was a common carrier subject to the act. The language relied upon to sustain that position was the same language cited by appellant herein; namely, the definition of “transportation” in Section 1 of the act which includes cars and services in connection with refrigeration or icing. Armour Car Lines was described as a company owning, manufacturing and maintaining refrigerator, tank and box cars, owning and operat-

ing icing stations, and furnishing "cars for the shipment of perishable fruits, etc., and keeps them iced . . ." (p. 443). In an opinion by Mr. Justice Holmes the notion that refrigerator car companies were subject to the act is repudiated:

It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission is over the railroads that are subject to the act.

In 1928 in *United States v. Fruit Growers Express*, 279 U.S. 363; 49 Sup. Ct. 374; 73 L.Ed 739, the United States sought to punish the defendant, a refrigerator car company, for false reporting under section 20 (7) of the Interstate Commerce Act. The defendant was held not subject to the act and its penalties.

There was thus no doubt that refrigerator car companies were not subject to the Interstate Commerce Act.

In the Transportation Act of 1940, 54 Stat. 917, Congress saw fit to add Section 20(6) to the Interstate Commerce Act. It is only by virtue of this section that the Interstate Commerce Commission has jurisdiction to inspect books and prescribe forms of account for companies which "furnish cars for protective service against heat or cold." This section is the Commission's only source of authority over refrigerator car companies.

In summary, therefore, both before and after the 1939 amendments to the Federal Employers' Liability Act, in other areas of transportation legislation (Namely the Railway Labor Act and the Interstate Commerce Act) Congress has amended acts to specifically include refrigerator car companies. At the time of the 1939 amendments to the Federal

Employers' Liability Act consideration was given to expanding its scope, but there was neither need nor demand, on the part of employees of refrigerator car companies or any other rail-related activities. In addition, in the years immediately preceding the 1939 amendments Congress enacted major legislation in the transportation field which specifically recognizes and includes refrigerator car companies as a distinct type of activity.

The full scope of Judge Goodman's reasoning in *Gaulden* can now be seen. To argue at this date that the employees of refrigerator car companies should by judicial construction be placed within the Federal Employers' Liability Act runs completely contrary to the trend and sense of these cases, statutes and amendments.

II. There are no significant factual changes in appellee's operations from that shown in prior adjudications holding appellee and other refrigerator car companies as not being subject to the Federal Employers' Liability Act.

Appellant contends: "Secondly, the nature of appellee's business is now different, and it was not even presented fully to the District Court in 1948." (Brief p. 10) and, "The facts presently before this Court are different in many crucial respects from those recited in the *Gaulden* opinion notwithstanding the fact that the same appellee is involved." (Brief p. 12).

Appellee contends to the contrary that there are no significant factual changes in its operations since prior adjudications and that the essence of its business remains the renting of refrigerator cars and the furnishing of heat and cold protective services. (T.R. 34) The affidavit of W. G. Cranmer in support of the motion for summary judgment also shows:

"P. F. E. . . . is a supplier of services and vehicles to railroads, and does not hold itself out to render transportation service" (T.R. 35) ;

"Pacific Fruit Express does not issue bills of lading nor does it publish tariffs . . ." (T.R. 35)

An analysis of appellant's Brief shows two principal areas in which appellant claims appellee's operations are different from those that existed at the time of the *Gaulden* opinion. The first of these is that appellee has acquired refrigerated vans and other equipment for service in the piggyback field. The second is that appellee "serves the public directly" in that it furnishes car distribution service, diversion, and passing services, and takes orders for heat and cold protective service. Each of these will be taken up separately.

As to the question of acquisition of refrigerated vans, appellant recites in its statement of facts (Brief p. 4) that since June 1961 appellee has entered the piggyback rail field by acquiring refrigerated vans for the movement of commodities from shipper to terminal, etc. Appellant then sets forth the contention in a footnote at the bottom of page 14 that, "This therefore represents a change in appellee's operations since *Gaulden* . . ." In the first place, the acquisition of this type of equipment is entirely consistent with and does not show a change in the nature of appellee's business. That business has been and is now the furnishing of suitable vehicles for the carriage of perishable food stuffs and the furnishing of heat and cold protective services to these and other like vehicles. Whether the vehicles be railroad "reefer" cars or motor carrier type vans would seem immaterial in determining the essential nature of appellee's business, the essence of which is (insofar as concerned here) the renting of the appropriate container. In the second place, at least one court has determined that the addition of this

type of equipment does not alter the character of appellee's business. In *Aguirre v. Southern Pac. Co.*, 232 Cal.App. 2d 636; 43 Cal.Rptr. 73, at page 640 the Court specifically takes note that, "P. F. E. also owns and lets a number of trailers under contracts with thirty-three (33) railroads . . ." The Court concludes, however, that as to these and other factual details appearing since the decision in *Gaulden*, "We have reviewed the *Gaulden* case with particularity. We do so because our views accord with the reasoning of Judge Goodman, which we adopt as a basis for our holding. The facts of the two cases are, as stated above, nearly identical. *Where new facts emerge in the case at bench we do not find them significant.*" (Page 646, Emphasis supplied.)

In the third place, as previously pointed out, in *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, 35 Sup. Ct. 645; 59 L.Ed. 1036, the car line owned "refrigerator, tank and box cars," including cars for the transportation of perishables, but the Supreme Court of the United States absolutely rejects the suggestion that Armour Car Lines is a common carrier by rail. The character of the equipment owned, therefore, appears not to be decisive of this issue.

The matter of car distribution services is explained more fully in the literature attached to the declaration of Leland P. Jarnagin (T.R. 69). The literature states, "[Car distribution personnel] gather information about crop conditions and future need of cars in various loading territories so that they can arrange with the various railroads to move available cars to such loading territories so that they can arrange with the various railroads to move available cars to such loading territories at exactly the right times." (T.R. 74). This is again a function noted in *Aguirre v. Southern Pac. Co.*, 232 Cal. App. 2d 636; 43 C.R. 73, p. 640, but the court finds, "Where new facts emerge in the case at bench we do not find them significant." (p. 646). The truth of the

matter is that this is a function which is necessary and incidental to a car line company, but is hardly determinative of the character of the business.

As to the matter of furnishing diversion and passing services, appellant asserts at several places, that, "To serve the shipping public directly, appellee possesses 'offices and agencies in all principal western producing areas' . . ." (Brief, page 14); appellant also quotes material describing the diversion and passing services. (Brief page 16) It is apparently on the basis of these various offices and services that appellant asserts:

"It [P. F. E.] cannot now insist that it does not deal directly with the shipping public." (Page 17.)

In the first place one should note that the test of being a common carrier by rail within the meaning of the Federal Employers' Liability Act is not whether one deals directly with the public. Thus Railway Express Company, The Pullman Company and other corporations in rail related activities obviously deal directly with the public, but this has not affected the holdings cited in the opening paragraphs of this argument, that these corporations and activities are not within the ambit of the Federal Employers' Liability Act. The same reasoning applies here. It would appear that furnishing of diversion and passing services is a small and incidental part of appellee's business of renting refrigerator cars and furnishing heat and cold protective services. However, to the extent that such services entail dealing directly with the public, this does not furnish a test of whether an entity is a common carrier by rail within the meaning of the F.E.L.A.

Moreover, provision of services much more far-reaching than this have been held by the Supreme Court not to constitute one a carrier by railroad. In *Chicago Refrigerator*

Co. v. I.C.C., (1923) 265 U.S. 292, 44 S. Ct. 558, 68 L.Ed. 1024 the refrigerator company attempted to bring itself within the operating income guarantees of the Transportation Act of 1920, which applied to "carriers by railroad." The court states, "The Car Company solicited freight from shippers . . . and exercised a degree of supervision over the shipment. . . .; a small percentage . . . of shipments . . . were re-billed on the forms [i.e., bills of lading] of the Car Company . . ." (P. 294). The court holds the car company is not a carrier by railroad, citing *Ellis v. I.C.C.*, and relying on the analogy to language in the Interstate Commerce Act. Surely if such services and contact with the public do not make one a carrier by railroad, then appellee's diversion and passing services cannot do so either.

Much of appellant's recitation of factual material concerning appellee's operations is not new material at all and has been considered by other courts and this court heretofore. This includes the recitations that appellee owns car shops, ice plants, tracks at such locations, two engines located at Roseville and Tucson, etc. (Brief pp. 4, 23, 25) See the description particularly in *Gaulden*, op. cit., p. 653. Appellant's constant reference to PFE as "the first family of perishable transportation" and as furnishing "the finest in perishable transportation service" (Brief, pp. 6, 13, 16, 23) is patently a make weight argument. Such slogans may or may not be effective advertising but they are hardly determinative of the factual nature of appellee's activities, and are certainly no substitute for tariffs and bills of lading (which PFE does not have—T.R. 35) which one supposes would be essential to a common carrier by rail holding itself out for service to the public.

A word needs to be said concerning the source and status before this court of much of the factual material asserted

by appellant. At several points in his brief, appellant has included material not within the record in this case. For example, on page 14 appellant refers to a random sampling of various phone directories. No such material is in the record in this case. Again, in a footnote on page 26 appellants refers to facts not contained in the record. Of even more concern, however, is the status of the materials attached to the declaration of Leland P. Jarnagin, submitted to the court as an affidavit in opposition to the motion for summary judgment. This is discussed by appellant in a footnote on page 13. It appears Mr. Jarnagin called at the office of Pacific Fruit Express Company in San Francisco and secured certain explanatory and advertising literature. This literature was then attached to Mr. Jarnagin's declaration and used as evidence of the facts and matters set forth in the literature. As appellant correctly notes, this material was submitted to the court at the time of the motion of summary judgment without objection on the part of appellee. However, that does not mean that the material can be appropriately considered by the court. It will be readily apparent that the matters asserted in advertising literature are not something that Mr. Jarnagin knows of his own personal knowledge and can present to the court under oath in the form of an affidavit. Affidavits in support of or in opposition to a motion for summary judgment must be made on personal knowledge, setting forth facts admissible in evidence and showing that the affiant is competent to testify to the matters stated therein. To the extent the affidavits do not contain such material they must be disregarded by the Court. Fed. R. Civ. P. 56.

III. Neither terminal company cases nor cases from other activities closely related to railroading provide good authority for the decision of this case.

Commencing in section III of appellant's Brief, appellant argues that the so-called terminal company cases are better authority for a decision in this case than are the express company cases.

The first thing to be noted about such a contention is that it tacitly acknowledges the judicial and congressional recognition and separate treatment of all the various areas of activities closely related to railroading, of which terminal companies and express companies are illustrative. Such an argument is directed not at Pacific Fruit Express Company individually but at refrigerator car companies generally.

There is no need, however, in the decision of this case to refer to either the terminal company or express company cases. As pointed out heretofore, the courts early recognized refrigerator car companies as a distinct type of activity, a distinction which has been accepted by Congress in its legislative formulations, and there is an established body of authority recognizing refrigerator car companies as not subject to the FELA. This court in affirming *Gaulden* and the third circuit in *Hetman v. Fruit Growers Express Company*, 346 F.2d 947 have announced the rule that refrigerator car companies are not subject to the FELA. There is thus no need to refer to cases or legislation affecting any other separate area of activity and no need to indulge in considerations of whether the similarities between one area of activity and another are sufficient to afford a guidance for decision in this case.

Appellant relies extensively on *Parden v. Terminal Railroad of Alabama Docks Department*, 377 U.S. 184, 84 Sup. Ct. 1207, 12 L.Ed.2d 233. A brief reference to this case will indicate the desperation of appellant's argument in present-

ing authorities on this subject. The question at issue in that case concerned the State of Alabama's constitutional immunity from suit. That no other question was at stake is shown by the manner in which the question was raised. The respondent, the State of Alabama, appeared specially and moved to dismiss the action on the ground that the railway was the agency of the state and the state had not waived its sovereign immunity from suit. The District Court granted the motion on that ground and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court of the United States reversed, but only on the question of the immunity of the State of Alabama. Apparently it was conceded that if not immune, respondent's operations would be those of a common carrier by rail subject to the FELA. At any rate, aside from a paragraph at the beginning of the court's opinion, there is no discussion or analysis of this subject.

CONCLUSION

Appellant states that, "appellee cannot be heard to claim that it is exempt from the Federal legislation involved herein. If appellee were so exempt and immune, then *a fortiori* it would come within the scope of parallel state legislation." (Page 27).

The affidavit of W. G. Cranmer offered in support of the motion for summary judgment in the court below shows that pursuant to the Workmen's Compensation laws of the State of California appellant Elisha Edwards has been furnished a great deal of medical care and paid a significant amount of workmen's compensation benefits.

It thus appears that in fact appellee has functioned "within the scope of parallel state legislation." In the words of the Court in *Aguirre v. Southern Pac. Co.*, 232, Cal.App. 2d 636, 43 Cal.Rptr. 73 page 649: "These employees have, during all of those years, been working under, and enjoying

the benefits of workmen's compensation laws of California and of the other states in which P. F. E. operates (not the least of which benefits is compensation for all employment-induced health and accident casualties regardless of proof of negligence.) We would not lightly conclude that Congress, in the enactment of Section 55 of F. E. L. A., intended that the 4,000 employees of a large corporation now operating independently and legally as a non-railroad must suddenly be required to switch from the system of state workmen's compensation laws to the Federal Railroad Employees system, a transfer inevitably brought with hardship upon both employees and employers occasioned by readjustment . . ."

In the words of Judge Goodman, in *Gaulden v. Southern Pac. Co.*, 78 F.2d 651, page 657: "It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Liability Act into new fields. During the forty year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond railroading in its true sense."

Appellee respectfully submits that the statutory history and case authorities show that refrigerator car companies are not and should not be subject to the Federal Employers' Liability Act. Appellee further submits that its activities have been shown to be those of a refrigerator car company and have not significantly changed from those established in prior adjudications which hold it not subject to the F. E. L. A. The judgment of the Court below should be affirmed.

Respectfully submitted,

ALAN C. FURTH
JOHN J. CORRIGAN
DONALD O. ROY

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD O. ROY

No. 21,020

IN THE

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,

Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,

Appellee.

Appeal from Summary Judgment by the United States District
Court for the Northern District of California

APPELLANT'S REPLY BRIEF

WERCHICK & WERCHICK,

JACK H. WERCHICK,

ARNE WERCHICK,

240 Second Street,

San Francisco, California 94105,

Attorneys for Appellant.

FILED

APR 20 1967

WM. B. LUCK, CLERK

APR 21 1967

Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Statement of the issue	2
Summary of argument	3
Argument	3
I. Appellee cannot distinguish its operations from those of other common carriers by railroad	3
II. The actions of Congress and the courts require appli- cation of the Federal Employers' Liability Act in this case	9
Conclusion	12

Table of Authorities Cited

Cases	Pages
Aguirre v. Southern Pacific Co., 232 Cal.App.2d 636, 43 Cal. Rptr. 73	6
Barron v. Board of Dental Examiners, 44 Cal.App.2d 790..	6
Carroll v. Lanza, 349 U.S. 408, 75 S.Ct. 804, 99 L.ed. 1183 (1955)	7
Chicago Refrigerator Co. v. I.C.C., 265 U.S. 292, 44 S.Ct. 645, 59 L.ed. 1036 (1923)	9
Ellis v. Interstate Commerce Commission, 237 U.S. 434, 35 S.Ct. 645, 59 L.ed. 1036 (1914)	8, 9
Fleming v. Railway Express Agency, 161 F.2d 659 (C.C.A. 7)	8, 13

	Pages
Fort Street Union Depot Co. v. Hillen, 119 F.2d 307 (C.C.A. 6)	13
Gaulden v. Southern Pacific Co., 78 F.Supp. 651 (N.D. Calif.)	8, 10, 12
Great Northern R. Co. v. United States, 315 U.S. 262, 62 S.Ct. 529, 86 L.ed. 836 (1942)	11
Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 Pac. 594	6
Jones v. New York Central, 182 F.2d 326 (C.A. 6)	13
Jones v. Liberty Glass Co., 332 U.S. 524, 68 S.Ct. 229, 92 L.ed. 142 (1947)	10, 11
McCabe v. Boston Terminal Co., 303 Mass. 450, 22 N.E.2d 33	13
Mills v. Denver Tramway Corp., 155 F.2d 808 (C.C.A. 10)	6
Parden v. Terminal R. of Alabama Docks Dept., 377 U.S. 184, 84 S.Ct. 1207, 12 L.ed.2d 233 (1964)	4
Reed v. Pennsylvania Railroad Co., 351 U.S. 502, 76 S.Ct. 958, 100 L.ed. 1366 (1955)	4
Southern Pacific Co. v. Allen, 48 Tex.Civ.App. 66, 106 S.W. 441	6
Southern Pacific Co. v. Gileo, 351 U.S. 493, 76 S.Ct. 952, 100 L.ed. 1357 (1955)	4
Southern Pacific Co. v. Godfrey, 48 Tex.Civ.App. 616, 107 S.W. 1135	6
Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 84 S.Ct. 1, 11 L.ed.2d 4 (1963)	7
United States v. Fruit Growers Express Co., 279 U.S. 363, 49 S.Ct. 374, 73 L.ed. 739 (1929)	9
U. S. v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.ed.2d 805 (1963)	11
United States v. Pennsylvania R. Co., 323 U.S. 612, 65 S.Ct. 471, 89 L.ed. 499 (1944)	9

TABLE OF AUTHORITIES CITED

iii

	Pages
United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.ed. 175 (1932).....	11
U. S. v. Welden, 377 U.S. 95, 84 S.Ct. 1082, 12 L.ed.2d 152 (1964)	11
Wilson v. Bittick, 63 Cal.2d 30, 45 Cal.Rptr. 31, 403 P.2d 159	7

Codes

California Evidence Code:

Section 451(f)	7
Section 452(h)	7
Section 453	7
Section 459	7

California Public Utilities Code:

Section 211	13
Section 229	13
Section 230	13

Statutes

Ariz. Rev. Stats., Section 23-906	7
Federal Employers' Liability Act, 45 U.S.C.A., §51, et seq. . . passim	
Interstate Commerce Act (1940 Amendment):	
54 Stat. 898 et seq.	9
54 Stat. 917	10
Kansas Stats. Anno., Section 44-543	7
Nebraska Rev. Stats., Section 48-112	7
28 U.S.C., Section 1291	1

No. 21,020

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ELISHA EDWARDS,

Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY,

Appellee.

Appeal from Summary Judgment by the United States District
Court for the Northern District of California

APPELLANT'S REPLY BRIEF

JURISDICTIONAL STATEMENT

Jurisdiction of this court, in an appeal from a summary judgment entered by the United States District Court, rests upon 28 U.S.C. § 1291.¹ This appeal follows in timely and ordinary fashion from a final judgment entered below, and there is no disagreement between the parties hereto concerning the jurisdiction of this court.

¹By error, Appellant's Opening Brief referred to 28 U.S.C.A. §225 as conferring jurisdiction upon this court. There being no such section in Title 28, the citation should properly have been to §1291.

STATEMENT OF THE CASE

The facts of this case are reviewed in Appellant's Opening Brief and are acquiesced in by appellee in its brief.

In addition to the references set forth in the Opening Brief (A.O.B. p. 14), it has since been learned that appellee holds itself out to the public by means of classified telephone directories under the heading "Railroads" in Cincinnati, Ohio (June, 1966, page 534), Cleveland, Ohio (April, 1966, page 809), Denver, Colorado (July, 1966, page 643), Detroit, Michigan (September 1966, page 1164), Kansas City, Kansas and Missouri (February, 1967, page 620), Pittsburgh, Pennsylvania (December, 1966, page 636), Portland, Oregon (1966-1967, page 629), Salt Lake City, Utah (June, 1966, page 356), Seattle, Washington (March, 1966, page 584) and Tucson, Arizona (June, 1966, page 319), and under the heading "Railroad Companies" in Minneapolis, Minnesota (November, 1966, page 557) and Sacramento, California (January, 1967, page 576).

STATEMENT OF THE ISSUE

The question on appeal remains as set forth in Appellant's Opening Brief—the applicability of the language of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to appellee.

SUMMARY OF ARGUMENT

1. Modern judicial guidelines combined with the facts of appellee's business activities show that appellee is a common carrier by railroad within the Federal Employers' Liability Act. Appellee has not denied the truth of the facts which establish its character as a railroad. Since appellee does not operate within the scope of any state regulatory program and does function under the jurisdiction of the Interstate Commerce Commission, appellee is in a class with common carriers by railroad.

2. The early decisions cited as authoritative by appellee have been devitalized by the expansion of Congressional activity in the field of interstate commerce. Further, Congress has never evinced any desire to exclude appellee from the uniform program of regulation of common carriers by railroad.

ARGUMENT

I. APPELLEE CANNOT DISTINGUISH ITS OPERATIONS FROM THOSE OF OTHER COMMON CARRIERS BY RAILROAD.

The language of the FELA is at least as broad and all-embracing as that of the Safety Appliance Act of the Railway Labor Act, . . . If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to say, *in the absence of express provisions to the contrary*, that it intended to exclude a particular

group of such workers from the benefits conferred by the Act. *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 189-190, 84 S.Ct. 1207, 12 L.ed.2d 233 (1964). (*Italics added.*)

The language of the United States Supreme Court in the *Parden* decision cannot be lightly dismissed since it specifies in unambiguous terms the activities which bring a railroad operation within the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., and again expresses the broad reach of that Act through the phrase "common carrier by railroad." The true significance of *Parden* lies in the Court's recognition of the clear Congressional desire "to cover all rail carriers that constitutionally could be covered" (377 U.S. at 187, fn. 5) and the modern practice of the courts to apply the Act uniformly.² Since the F.E.L.A. does not set any precise standards to determine what businesses are common carriers by railroad, such contemporary determinations as *Parden* must control in analyzing the true nature and significance of appellee's operations. Appellee makes no effort to present any more definitive authority than *Parden*; nor does appellee deny engaging in any of the operations used in that decision to characterize a railroad company.

Appellant has not suggested that a railroad is defined by any one of its many operations. Rather, it is manifestly the cumulative nature of the enterprise

²Cf. *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502, 76 S.Ct. 958, 100 L.ed. 1366 (1955), and *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 76 S.Ct. 952, 100 L.ed. 1357 (1955), as modern examples of the sweep of the F.E.L.A., including activities far more remote from the movement of trains in interstate commerce than those of appellant in this case.

which controls. While not dispositive of this case by itself, for example, appellee's operation of refrigerated vans in addition to railroad cars shows an effort by appellee to offer broad transportation services to the public as opposed to limiting its business to the servicing of refrigerator cars for other railroads. Appellee's car distribution, diversion and passing operations establish the clear degree of *control* which appellee exerts over the interstate carriage of goods by rail—as much as if appellee itself were providing the motive power for the trains—and negates any claim that appellee limits itself to providing a static or auxiliary service to railroads. Appellee's characterization of its own operations publicly as a “railroad” or “the first family of perishable transportation” adds to the total picture and invalidates the posture which appellee seeks to assume before the courts.

Appellee's only answer to the array of railroad operations set out in the Opening Brief consists of an effort to examine each point individually and ignore completely the total picture. Recognizing that this approach does not alter the impact of the Record, appellee then attacks the validity of its own publications and advertising. (Appellee's Brief, p. 16.) In fact, the materials submitted through the declaration of Leland P. Jarnigan (TR 69 et seq.) are properly before this court. Their authenticity is established by the declaration (and unquestioned by appellee), and their effect is to expose the insufficiency of the affidavit of W. G. Cranmer submitted on behalf of appellee below. Appellee cannot seriously challenge the use of these docu-

ments, especially since it resorts to these materials in its brief (p. 13) to describe its own operations thereby showing conclusively that the affidavit of Mr. Cranmer does not present a sufficiently detailed view of Pacific Fruit Express Company.³ Suffice it to say that appellee has not denied the truth of any of the facts appearing in the materials filed by appellant. Neither does appellee dispute that it holds itself out to the general public as a railroad in telephone directories in a multitude of cities. The use of telephone directory advertisements as corroborating evidence is not a new or novel concept. See *Hood v. Bekins Van & Storage Co.*, 178 Cal. 150, 172 Pac. 594. Since a federal appellate court has the power to notice judicially facts which are generally known and accepted, *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (C.C.A. 10), appellant urges that the existence of certain words in books in general circulation is properly brought to this court's attention.⁴

³It is surprising that appellee, although it did not object to the use of these materials at the trial level, now objects to appellant's use of these statements under the established evidence doctrine of admissions against interest. Advertisements by railroad companies specifically have been found to constitute admissions against interest to be treated the same as any other admission; such evidence is not rendered any less significant by the contention that it was only an advertisement to catch the credulous public. *Southern Pacific Co. v. Allen*, 48 Tex.Civ.App. 66, 106 S.W. 441; *Southern Pacific Co. v. Godfrey*, 48 Tex.Civ.App. 616, 107 S.W. 1135. It should be noted that appellee strenuously urged the acceptance of self-serving hearsay (i.e., many of the statements in Mr. Cranmer's affidavit which are clearly beyond his personal knowledge) in *Aguirre v. Southern Pacific Co.*, 232 Cal.App.2d 636, 43 Cal.Rptr. 73, TR 30-31.

⁴"We are of the opinion . . . that the fact that the regular issues of the directory of the telephone company are 'brought home to the public' is a matter of such common knowledge that there was no necessity for testimony with respect thereto." *Barron v. Board of Dental Examiners*, 44 Cal.App.2d 790, 795, upholding

Since this matter arises on summary judgment, doubts as to the sufficiency of the evidence of any essential fact should be resolved against appellee. Cf. *Wilson v. Bittick*, 63 Cal.2d 30, 34-35, 45 Cal.Rptr. 31, 403 P.2d 159.

Appellee, although engaged in the common carriage of goods in interstate commerce, currently appears to enjoy the rather singular privilege of being responsible to no government, state or federal. This peculiar status is plainly unintended by either state or federal legislatures which have uniformly sought to regulate all instrumentalities directly affecting the movement of goods. Appellee's suggestion that it functions within the scope of state legislation alternative to the F.E.L.A. (p. 18) is without merit. The fact that Pacific Fruit Express attempts to restrict its California employees to an administrative compensation remedy has no effect on this action, cf. *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.ed. 1183 (1955), is not properly evidence of the nature of appellee's activities, *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.ed.2d 4 (1963), and does not accurately state appellee's exposure to damage actions in the various states in which it does business. In many jurisdictions, the state administrative compensation schemes are optional and may be waived in favor of a civil action against the employer.⁵ In the

the administrative suspension of a dentist's license to practice because of advertising appearing in the telephone directory. See also California Evidence Code §§ 451(f), 452(h), 453 and 459, for the rules of judicial notice applicable currently in California.

⁵Sec, for example, Ariz.Rev.Stats. §23-906, Kansas Stats.Anno. §44-543, Nebraska Rev.Stats. §48-112.

area of substantive regulation, moreover, appellee is silent in the face of statutes of six states in the Ninth Circuit which classify appellee as a common carrier by railroad and thereby presumably impose attendant responsibilities. (A.O.B. 27-28.) By reporting to the Interstate Commerce Commission and not to any state utilities commission (TR 35), appellee plainly acts within the federal—not a state—regulatory system.

Appellee has not denied that it engages in a range of activities in interstate commerce far wider in scope than the mere icing of railroad cars. Rather, appellee carefully avoids taking a broad view of its operations, approaches each activity individually and cites authority only for the proposition that no single activity alone makes appellee a railroad. Two examples should suffice to show the specious nature of this analysis. Appellee dismisses the character of the equipment owned as not decisive of the issue (Appellee's Brief p. 13), citing *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, 35 S.Ct. 645, 59 L.ed. 1036 (1914). Appellee ignores the limitation of the holding in *Ellis* to the duties of the "owners and builders" of the instrumentalities of transportation. More significantly, appellee now concedes tacitly that it deals directly with the public (Appellee's Brief pp. 13-14) but notes that Railway Express Company deals directly with the public.⁶ This is apparently a reference to *Fleming v. Railway Express Agency*, 161 F.2d 659

⁶It is noteworthy that most essential to the decision in *Gaulden v. Southern Pacific Co.*, 78 F.Supp. 651, was the finding that "Pacific Fruit Express Company transacts none of its protective service business directly with the shippers." (78 F.Supp. at 654.)

(C.C.A. 7), which held that the F.E.L.A. did not apply to that express company *even though Railway Express Agency was in fact a common carrier*. The distinguishing factor was the lack of ownership and operation of railroad equipment. It is obvious that the fact that appellee combines the activities of both Armour Car Lines and Railway Express Agency must mitigate in favor of the application rather than the exclusion of F.E.L.A. coverage for its employees.

II. THE ACTIONS OF CONGRESS AND THE COURTS REQUIRE APPLICATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT IN THIS CASE.

Appellee relies in its brief upon a series of decisions which have essentially lost whatever vitality they once may have had. *Ellis v. Interstate Commerce Commission*, 237 U.S. 434, 35 S.Ct. 645, 59 L.ed. 1036 (1914), *Chicago Refrigerator Co. v. I.C.C.*, 265 U.S. 292, 44 S.Ct. 645, 59 L.ed. 1036 (1923), and *United States v. Fruit Growers Express Co.*, 279 U.S. 363, 49 S.Ct. 374, 73 L.ed. 739 (1929), all dealt with questions long since put to rest by the monumental changes which have since occurred in the area of interstate commerce, not the least of which was the amendment of the Interstate Commerce Act in 1940, 54 Stat. 898 et seq., providing a completely integrated regulatory system over common carriers in the United States.⁷ In none of these cases was the F.E.L.A. in issue. In each case, the intent of the Court to diminish rather than

⁷*United States v. Pennsylvania R. Co.*, 323 U.S. 612, 65 S.Ct. 471, 89 L.ed. 499 (1944).

expand the impact of Congressional regulation was evident. All three decisions were basically negated by the 1940 Interstate Commerce Act amendment, 54 Stat. 917, which required the companies involved to report to the Commission in the same manner as all other instrumentalities of interstate common carriage in the United States. It is undeniable that modern concepts have ousted those notions of interstate commerce which prevailed in the first third of this century; it is no longer appropriate that outdated and restrictive decisions be used in an effort to impede broad remedial legislation such as the F.E.L.A.

Except for eliminating certain common law defenses and extending the F.E.L.A. into certain intrastate operations of common carriers by railroad, Congress has not change the F.E.L.A. since 1908. In the 1939 amendments, Congress made no effort to define further the broad phrase "common carrier by railroad" which has been used throughout the life of the Act. In view of the fact that the question of including refrigerator car operations under the F.E.L.A. did not arise until *Gaulden v. Southern Pacific Co.*, *supra*, 78 F.Supp. 651 (N.D.Calif.), in 1948, it seems unreasonable to place any construction in this regard on the 1939 actions of Congress. At best, the doctrine of legislative acquiescence is only an "auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533, 68 S.Ct. 229, 92 L.ed. 142 (1947). It should not properly be used in a situation where Congress was not confronted with any decisions directly in point in which to acquiesce. The

comprehensive scheme of railroad regulation statutes enacted in conjunction with and after the F.E.L.A. (see discussion A.O.B. pp. 19-21) is far more reliable in showing the broad intention of Congress; subsequent legislation is a less contrived guide in interpreting earlier legislation on the same subject. *Great Northern R. Co. v. United States*, 315 U.S. 262, 62 S.Ct. 529, 86 L.ed. 836 (1942). Congress is not expected to act every time a court misconceives its intentions. See, for example, *Jones v. Liberty Glass Co.*, *supra*, 332 U.S. 524, 534; *U.S. v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.ed.2d 805 (1963); *U.S. v. Welden*, 377 U.S. 95, 84 S.Ct. 1082, 12 L.ed.2d 152 (1964).

During the discussion of the 1939 amendments, there was some consideration given to including enterprises plainly outside the phrase "common carrier by railroad." Since the Senate report gave no reason for the decision to delete these groups from the proposed amendment other than a lack of "necessity" or "demand" (TR 64), any speculation regarding the intent of Congress in so acting tends to introduce rather than eliminate ambiguity in the construction of the Act.⁸ More significantly, companies such as appellee herein were not discussed in any context in the 1939 amendments, thereby precluding the drawing of any reliable inference on this question. Appellee, however, places a construction upon Congressional activity in the area of

⁸Committee reports are of value only where the meaning of Congress is doubtful and reference to such reports resolves, rather than creates, an ambiguity. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.ed. 175 (1932).

railroad legislation which suggests a Congressional intent to create conflict and inconsistency in this field. In view of the fact that the Federal Employers' Liability Act does not exist in a vacuum but is a part of a comprehensive legislative program, it is highly unlikely that Congress intended to introduce any ambiguity into this area.

CONCLUSION

In each instance where appellee has been excused from the operation of the F.E.L.A., the decision in *Gaulden v. Southern Pacific Co.*, *supra*, 78 F.Supp. 651, has been accepted uncritically as dispositive of the issue, and subsequent rulings are only as strong as the analysis in *Gaulden*. It must be emphasized that there is no modern authority which considers the F.E.L.A. in terms of the facts heretofore established regarding appellee. A full examination of the facts of appellee's activities in light of modern judicial trends reveals the double image adopted by Pacific Fruit Express. To the public, appellee acts, looks and operates as a common carrier by rail. In litigation, appellee struggles to fit the image of a peripheral service enterprise divorced from the transportation of goods. The interests of justice require that the exploration of appellee's activities be complete and not stop with a superficial and uncritical acceptance of appellee's self-serving posturing. Appellant respectfully urges that the point has been reached where "this court should

not be ignorant as judges of what (it knows) as men."⁹

The question must be asked whether appellee is now denying that it is a common carrier or that it operates by railroad. If express companies are common carriers, *Fleming v. Railway Express Agency*, *supra*, 161 F.2d 659 (C.C.A. 7); *Jones v. New York Central*, 182 F.2d 326 (C.A. 6), terminal companies are common carriers, *Fort Street Union Depot Co. v. Hillen*, 119 F.2d 307 (C.C.A. 6); *McCabe v. Boston Terminal Co.*, 303 Mass. 450, 22 N.E.2d 33, and refrigerator car companies are common carriers, California Public Utilities Code §§ 229, 230, 211, then surely appellee is a common carrier. It is not denied by appellee that it acts in interstate commerce; nor does appellee deny its extensive ownership and operation of equipment which is common only to railroad companies. It is respectfully urged that the judgment of the District Court be reversed and that this cause be remanded for trial upon the merits under the Federal Employers' Liability Act.

Dated, San Francisco, California,

April 17, 1967.

WERCHICK & WERCHICK,

JACK H. WERCHICK,

ARNE WERCHICK,

Attorneys for Appellant.

⁹Justice Frankfurter, writing in *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.ed. 1801 (1949).

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARNE WERCHICK,
Attorney for Appellant.

✓
N O. 2 1 0 2 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

OCT 25 1966

WM. B. LUCK, CLERK

WEBB & WEBB

612 Jergins Trust Building
Long Beach, California 90802

Attorneys for Appellant

N O. 2 1 0 2 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WEBB & WEBB

612 Jergins Trust Building
Long Beach, California 90802

Attorneys for Appellant

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
CHRONOLOGY	1
FROM THE RECORD	2
ERRATA ASSIGNED BY RESPONDENT	2
MEMORANDUM RE ALLOWANCES	3
FINDINGS OF FACT (SUMMARY)	4
CONCLUSIONS OF LAW (SUMMARY)	7
ARGUMENT	8
RE: MONIES HELD BY THE RECEIVER	8
RE: RES JUDICATA	13
RE: JURISDICTION OF DISTRICT COURT JUDGE	14
RE: FINDINGS OF DISTRICT COURT	16
RE: DISTRICT COURT ORDER WITHOUT EVIDENTIARY SUPPORT	19
RE: CONCLUSIONS OF LAW	20
RE: ORDER APPEALED FROM	21
TRUE ERRATA	23
SUBMISSION	24
CERTIFICATE	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
In re Abbott Kinney Co. (Cal.), 66 F. Supp. 841	14
In re Arbycraft Co., 288 F. 2d 553	22
Assoc. El. of Omaha, 288 F. 2d 683	15
Bank of America v. Williams, 89 Cal. App. 2d 21	20
In re S. F. Brothers Co., 151 F. Supp. 153	12, 14
In re Childs, 52 F. Supp. 89	23
Clark v. Huckaby, 28 F. 2d 154	9
Florida Tlr. v. Deel, 284 F. 2d 567	13
In re Albert Harris, Inc., 313 F. 2d 447	13
Hebert v. Crawford, 228 U. S. 204	9
Heffron v. Western Loan, 84 F. 2d 301 (9th Cir.)	8
Imperial Assn. Co. v. Livingston, 49 F. 2d 745	8
Johnson v. Collins, 222 U. S. 538	8
Lazarus v. Prentice, 234 U. S. 263	8
Rasmussen v. Grisley, 77 F. 2d 252	22
In re Ripp, 242 F. 2d 849	13

	<u>Page</u>
In re Sadler, 104 F. Supp. 886	22
In re St. Lawrence Milk Co. , 9 F. 2d 896	24
In re Sherman Plastering Corp. , 340 F. 2d 915	13
In re Terry, 97 F. Supp. 635	16, 24
U. S. for Use & Benefit of Kirbys v. So. Contractors, 211 F. Supp. 537	13
In re Love B. Woods Co. , 222 F. Supp. 160	15, 16, 24

Statutes

Bankruptcy Act, 11 U. S. C. A. :

§50	12
§50, sub. n	23
§53, General Order 34	23, 24
§53, General Order 47	22
§69, sub. b	23
§78, sub. n	23
§95, sub. b	15
§109	23
§109, sub. b	23

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

APPELLANT'S OPENING BRIEF

CHRONOLOGY

Appellant was brought into Bankruptcy Court by Involuntary Petition which was subsequently Dismissed without adjudication thereon.

After said Dismissal, certain monies held by Receiver in Bankruptcy, as assets of Appellant, were ordered returned to Appellant, by the Referee in Bankruptcy.

Respondent, as a secured creditor herein, did, upon Application for Review of said Order of Referee, obtain reversal of portions thereof, including the award to Respondent of the remainder of those

monies held by said Receiver, by Order of the District Court.

Appellant did file objections to said District Court Order, and also to the findings of fact and conclusions of law in support thereof, alleging insufficiency of evidence to support said findings; findings fail to support the conclusions; and the record fails to support said District Court Order.

The District Court took no action upon said objections, and said findings, conclusions and Order were each signed, and entered herein.

Appellant prosecutes this Appeal from said Order of said District Court.

FROM THE RECORD

ERRATA ASSIGNED BY RESPONDENT

Respondent's Application for Review assigns as error, Paragraphs 3, 4, 5 and 6 (Tr. of Record pp. 101 and 102).

Paragraph 3. Said Referee's Order failed to find:

"That the Receiver stated in open Court that he would in effect sequester the rents by using them only for expenses of operating the properties, and pursuant thereto, Respondent agreed that a formal Order was not necessary."

Paragraph 4. Said Referee's Order failed to find:

"That certain other expenses relating to protection

of Respondent's interest in the subject property were paid prior to foreclosure sale."

Paragraph 5. Objects to the conclusion of Referee that any fees paid subsequently to foreclosure sale do not constitute valid claims against the funds held by Receiver.

Paragraph 6. Objects to awarding of payment out of Referee held funds, attorney's fees to Appellant's Counsel, and Appellant's Assignment to Malter.

MEMORANDUM RE ALLOWANCES
(Tr. of Record pp. 95 to 99)

Referee's Memorandum re Allowances decrees:

That the Involuntary Petition in Bankruptcy, which originated this matter, had been dismissed, and that Chapter X proceedings were filed, and also dismissed.

The Receiver holds more than \$16,000.00 rental sums.

During pendency of proceedings, Respondent was restrained from proceeding with foreclosures. Finally, Respondent, by stipulation, waived any right for a deficiency judgment, provided Respondent be allowed to foreclose; and on Dec. 17, 1964, pursuant to said stipulation, the Court dissolved all restraining orders. Prior to Dec. 17, 1964, Respondent had filed application for sequestration of rents.

At final meeting of Creditors on November 4, 1965, Respondent contended that by terms of its deeds of trust, Respondent was entitled to the rental sums held by Receiver, and objected to payment of attorney's fees to Appellant's Attorney.

Appellant contended that since proceedings were dismissed, all funds should go to Appellant.

As far as this Court can determine from the evidence, at foreclosure sale, Respondent purchased the property for the full amount of its note, plus interest. There were certain amounts of taxes due and attorney's fees, but these were paid by Respondent subsequent to foreclosure sale.

The Court is of the opinion that any payments made by Respondent after foreclosure sale were made as purchaser.

Therefore, after the making of allowances, the balance of the funds should be returned to the Debtor (Appellant).

Allowances were made, including fees to Receiver, to the Attorneys for Receiver, to the Attorney for original Petitioning Creditor, and to Appellant's Attorney, the sum of \$2,150.00.

Supplemental Order allowed Appellant's assignment of \$2,000.00, payable out of funds to be returned to the Debtor.

FINDINGS OF FACT (SUMMARY)
(Tr. of Record pp. 110 to 118)

A summary of the District Court's findings of fact are:

Pursuant to Involuntary Petition in Bankruptcy against Appellant, alleged Bankrupt herein, a Receiver was appointed to

and did, collect and hold certain rents arising from real properties owned by Appellant, but subject to certain deeds of trust as security for promissory notes held by Respondent, a secured creditor, who petitioned for, but did not obtain, an Order herein to sequester certain of said rents.

Respondent was enjoined by restraining order herein, from proceeding with certain then pending foreclosures against certain of Appellant's real properties.

Chapter X proceedings were commenced, but subsequently Dismissed, wherein Respondent was enjoined from proceeding with any foreclosure against Appellant's real properties.

All restraining orders were dissolved by Order of Referee and a Judge of the above District Court, as to Respondent, who was thereby allowed to, and did, proceed with all of said foreclosures; all pursuant to Stipulation thereto by Respondent.

No Adjudication was ever made upon said Involuntary Petition, and Appellant moved for dismissal; at hearing thereon, Respondent stipulated to such dismissal and the Referee so ordered.

Appellant petitioned the Bankruptcy Court for an Order to compel the Receiver to turn over to Appellant all of the assets of Appellant, then held by said Receiver. Respondent filed objections, requesting said assets be turned over to Respondent.

After a hearing, the Referee ordered that after the making of certain allowances, including attorneys' fees, payable from out of said funds held by Receiver, the balance thereof should be returned to Appellant.

(Finding No. 11)

The Receiver represented in open Court that the rents would not become general assets, but would be held for benefit of Respondent. Respondent accepted, and it was acceptable to Referee, but no Order was made thereon. Neither Appellant nor his Attorney objected thereto.

(Finding No. 14)

See Tr. of Record p. 114, line 7.

(Finding No. 15)

The deeds of trust provide they are security for each agreement therein, including costs, expenses and Attorney's fees. The promissory notes provide for payment of one-fifth of one per cent on unpaid balance, upon default. Unpaid balance at time of default was approximately \$3, 750, 000.00.

(Finding No. 16)

December 23, 1964, Respondent purchased the encumbered properties upon foreclosure sale, for a sum equal to principal, interest and trustee's costs, but not sufficient to cover certain fees, and default charge for a total of \$19, 100.00.

(Finding No. 31)

The record does not show any surplus as result of Trustee's Sale or by award to Respondent of Receiver held funds.

(Finding No. 32)

1. Respondent does not seek any deficiency under the deeds of trust, its claim is for funds which were held for its benefit pursuant to application for sequestration and Receiver's stipulation

thereon.

(Finding No. 33)

1. Respondent's filing of application for sequestration was sufficient to obligate the Receiver to sequester said rents, and was all that Respondent could do in the premises.

CONCLUSIONS OF LAW (SUMMARY)
(Tr. of Record pp. 118 and 119)

No. 1 holds: a. That Respondent was not estopped by entering into the stipulation of December 17, 1964, from asserting its rights to the monies held by Receiver; and did not waive its rights to make such claim.

No. 2 holds: a. Monies were held by Receiver for the benefit of Respondent;

b. Said monies were subject only to Receiver's fees and for services contributing to the creation of said monies;

c. Respondent was in constructive possession of the real properties. (Security for the trust deeds.)

No. 3 holds: a. Fees to Attorney for Bankrupt.

b. Balance of Receiver held funds to Appellant.

No. 4 holds: Respondent is entitled to Order of Reversal of those parts of the Order of Referee:

a. Awarding balance of funds to Appellant;

b. Honoring \$2,000.00 assignment by Appellant;

c. Award of \$2,150.00 fees to Appellant's Attorney.

ARGUMENT

RE: MONIES HELD BY THE RECEIVER

As Owner of the 101 parcels of real properties, Appellant was legally entitled to the rents therefrom.

The filing of the Involuntary Petition in Bankruptcy did not result in divesting Appellant of his title thereto.

The act of the Receiver in taking possession of the real properties, and collecting and holding the rents thereof, likewise did not effect a divestation of Appellant's title thereto.

Although upon the filing of Petition in Bankruptcy, all property in which the Bankrupt has an interest passes under the control of the Court, title thereto does not then pass; such title remains in the Bankrupt until the qualification of the Trustee.

Heffron v. Western Loan, 84 F.2d 301 (9th Cir.).

A Receiver takes no title, he is a custodian to hold and preserve the property for the Bankrupt pending the time when it can be turned back to the Bankrupt upon dismissal of Petition, or if adjudication be denied, or to the Trustee if there be adjudication.

Lazarus v. Prentice, 234 U.S. 263;

Imperial Assn. Co. v. Livingston, 49 F.2d 745.

After the filing of the Petition in Bankruptcy a defeasible title remains in Bankrupt.

Johnson v. Collins, 222 U.S. 538.

A Receiver is a custodian, holding the Bankrupt's property as an Officer of the Court, preserving it until it can be turned

back to Bankrupt if adjudication be denied, or turn it over to the Trustee, if adjudication results.

Clark v. Huckaby, 28 F.2d 154.

A Receiver has no right, title or interest in those assets taken into his possession as such Receiver. A Receiver's powers are governed by the Bankruptcy Act; they are limited, and are not as broad as a Receiver in a general action in Equity. Such powers do not include the right to bargain away the property of or any interest therein of, the alleged Bankrupt, in relation to whom, the Receiver, stands as a fiduciary, entrusted with the care of and the preservation of, those said assets of said alleged Bankrupt.

Assuming that a formal Order for Sequestration had been issued by the Referee, such Order would not, of itself, convey any title therewith.

The result would be, to effect a "holding by Receiver, subject to claim of lien thereupon by Respondent, as additional security for the debt represented by the promissory notes, which were secured by said deeds of trust."

Such said claim of lien would be an issue, necessitating a determination thereof by a Hearing before the Referee.

No matter in what capacity Bankrupt may be holding the property, if Bankrupt has actual possession, custody or control, resort must be had to the Referee of the Bankruptcy Court to determine the equities therein.

Hebert v. Crawford, 228 U.S. 204.

Such powers may not be usurped by the Receiver.

A Hearing, with an opportunity to the claimant, and also to the alleged Bankrupt, to be heard, and to adduce evidence, is a necessary factor, and in the absence thereof, any determination thereon would be inequitable and void.

Respondent appears to rely almost entirely upon the District Court's Finding No. 11 (Tr. of Record, p. 113, lines 11-23).

By said finding, said Court merely determined a probative fact, to wit, that an agreement had been reached by and between the Receiver and the Respondent, sometime in November, 1964, to the effect that "said funds - would not become general assets subject to claims of creditors and would be held for the benefit of Respondent. "

Assuming, which Appellant denies, that such said agreement was binding and effective, no greater interest or right in or to said funds would accrue in favor of Respondent than a formal Order for Sequestration would confer, that is, the subjugation of the funds for the purpose of satisfying those indebtedness secured by said 101 promissory notes and the 101 deeds of trust.

Upon such hypothesis, what indebtedness, if any, does Respondent assert? Apparently none, should effect be given to the District Court's Finding No. 32, that "Respondent is not seeking to recover any deficiency under the deeds of trust" (Tr. of Record, p. 118, lines 5-13). Appellant submits that no other theory would be legally sufficient to sustain Respondent's claim.

Respondent must establish itself as a creditor, with the right to resort to said funds as security for those specific indebted-

ness that arose pursuant to said 101 promissory notes and 101 deeds of trust.

Again, granting, which Appellant disputes, that Respondent had established the right to resort to said funds held by the Receiver prior to date of December 17, 1964, said Respondent did, by its stipulation, and confirmed by said Order of December 17, 1964 (Finding 14, Tr. of Record, p. 114, line 17).

" . . . agree to limit the recovery of said secured indebtednesses to those real properties encumbered by said 101 deeds of trust, and to waive and forego any deficiency that may arise upon foreclosure thereof, as against -- Bankrupt (Appellant) herein."

Further, pursuant to said stipulation, said Order does decree:

" . . . and it appearing to the Court to be in the best interests of the Estate of the within Bankrupt - (Appellant);

"Be It Ordered - - - the parties having stipulated - to limit the recovery of said secured indebtedness to those real properties encumbered by said 101 deeds of trust, and to waive and forego any deficiency that may arise upon foreclosure thereof - Be It Ordered - all Orders - enjoining - Respondent - be and are dissolved, dismissed and discharged, to allow - Respondent, to pursue foreclosure proceedings upon the 101 promissory

notes secured by said 101 deeds of trust only."

District Court's Finding No. 14 (Tr. of Record, p. 114, lines 7-27).

The record would compel such a finding, had none been made thereon (Tr. of Record, pp. 47 to 51).

Such a finding confirms a prior Order of adjudication upon Respondent's claim, and said prior Order was and is res judicata of Respondent's said claim.

That the assets of said alleged Bankrupt (Appellant) did consist wholly of the 101 encumbered real properties, plus those funds in the possession of the Receiver only, so that in decreeing that it appeared to the Court to be in the best interests of the estate of said Bankrupt to permit foreclosures against said real properties could mean only that the Bankruptcy Court was referring to said funds in the possession of the Receiver, and the sole purpose of such said Order was to preserve to said Bankrupt and his general creditors those said Receiver held funds.

A compromise is addressed to the sound discretion of Referee and will not be disturbed unless abuse of discretion appears.

In re S. F. Brothers Co., 151 F. Supp. 153.

Compromise: Bankruptcy Act, Sec. 50. Compromise. The policy of the law is to encourage settlement.

After affirmance of Referee's Approval of Compromise by the District Court, the Order will not be reversed unless discretion

has been abused.

Florida Tlr. v. Deel, 284 F.2d 567.

Approval of a Report and Order of Referee rests in sound discretion of District Judge. A Reviewing Court will not disturb or set aside a compromise unless it achieves an unjust result.

In re Albert Harris, Inc., 313 F.2d 447.

Where Party has subjected himself to jurisdiction of Referee through participation in compromise, he is bound thereby.

In re Sherman Plastering Corp., 340 F.2d 915.

One cannot escape agreement to compromise without return of consideration received.

U. S. for Use & Benefit of Kirbys v. So. Contractors, 211 F. Supp. 537.

RE: RES JUDICATA

From time of filing of Petition, Bankrupt's assets are in custodia legis, and Bankruptcy Court has exclusive jurisdiction and sole right to determine validity of any and all alleged liens thereon.

In re Ripp, 242 F.2d 849.

Party who enters into agreement before Referee thereby subjects himself to Bankruptcy Court's summary jurisdiction as to entire dispute over enforcement of agreement.

In re Sherman Plastering Corp., 340 F.2d 915.

During pendency of Involuntary Bankruptcy proceedings,

it was proper for claimants to appear therein (in Bankruptcy Court) to claim ownership of property in alleged Bankrupt's possession and request that property be released to them, and should Court on hearing establish property belonged to alleged Bankrupt, such determination would be res judicata in any subsequent proceedings.

In re Abbott Kinney Co. (Cal.), 66 F. Supp. 841.

Where Creditors may not be able to support act of Bankruptcy upon filing of Involuntary Petition, while proceedings were in Bankruptcy Court, that Court was a court of competent jurisdiction to determine matters pertaining to alleged Bankrupt's property and property found in its possession, and Bankruptcy Court had jurisdiction to determine ownership of monies.

Referee in Bankruptcy has authority to pass upon claims of Bankrupt and Bankrupt's Creditors, each vs. other, even though Creditor's claim was not at one time liquidated.

In re S. F. Brothers Co. , 151 F. Supp. 150.

RE: JURISDICTION OF DISTRICT COURT JUDGE

An Order or Decree of a District Court Judge is binding upon all other Judges of such said District Court, so long as it remains, and unless and until it be vacated or set aside.

It is res judicata of all those matters ruled upon therein. Consequently, should another Judge of such said District Court, by subsequent Order, without such said prior Order having been

set aside or vacated, Decree contrawise upon said matters resolved by such said prior Order, then that said subsequent Order would be null and void, as being an attempt to adjudicate without having jurisdiction of the subject matter.

It is axiomatic, that when two authorities of equal powers render a Decision upon the same matter, the first in time prevails. The Referee's Order of Dismissal of the Involuntary Petition in Bankruptcy herein, dated February 16, 1965, shows on its face (Tr. of Record, p. 58):

1. Dismissal of Involuntary Petition in Bankruptcy;
2. Dismissal of Petition in Intervention;
3. Covenant by Respondent to pay certain of the

Creditors of Appellant;

4. Termination of all other matters of said Bankruptcy, except an accounting by the Receiver;

5. Approval of said Order as to form by Respondent.

After a Dismissal of a Petition in Bankruptcy, the Bankruptcy Court was without jurisdiction to adjudicate controversies; but does retain jurisdiction to make allowances.

Love B. Woods Co., 222 F. Supp. 160.

Issues between Creditors and Debtor do not survive the Dismissal. Court was without jurisdiction to adjudicate Creditors' disputed claim, or determine the validity thereof.

Assoc. El. of Omaha, 288 F.2d 683;

11 U.S.C.A. 95 Sub. b.

Dismissal left Bankruptcy Court with nothing upon which its

juris could operate insofar as counterclaim be concerned.

Love B. Woods Co., 227 F. Supp. 162.

Upon a Dismissal of an Involuntary Petition in Bankruptcy, that property in the hands of the Receiver should be turned over to the alleged Debtor. The Appellate Court will so Order.

In re Terry, 97 F. Supp. 635.

Appellant submits that said Dismissal of the within matter, to which Respondent stipulated, "terminated all matters, save an accounting by the Receiver". Respondent should be estopped thereby, from pursuit herein of Respondents within claim.

RE: FINDINGS OF DISTRICT COURT

A Summary of the findings of the District Court are set out hereinbefore in this Opening Brief.

Respondent relies on findings Nos. 11, 15, 16, 31, 32 and 33 to support its claim to the funds held by the Receiver.

In amplification of the effect of said Stipulation of the Respondents and Order pursuant thereto, dated December 17, 1964, it appears abundantly clear therefrom, that:

Respondent was released out of the Bankruptcy Court, and allowed to pursue those particular security assets which, and in the manner which, Respondent had selected, all without any supervision of or control by, said Court.

Respondent did accept the benefits thereof, by pursuit of

and the consummation of, such said foreclosures.

Finding No. 11, if acceptable, merely recites an alleged probative fact; it would merely result in an "ear-marking" of the Receiver held funds as "subject to Respondent's right to assert his claim to resort to said funds to satisfy his alleged indebtednesses as secured by the notes and deeds of trust, upon **PROOF OF RIGHT OF LIEN** thereon, by a Hearing before the Referee." No such Hearing was ever held, and none appears to have been sought.

Finding No. 15 refers to purported contractual obligations set out in said notes and deeds of trust, as security for certain obligations of indebtednesses.

Finding No. 16 recites the fact of foreclosure sale resulting in obtainment of proceeds sufficient in amount to satisfy certain indebtednesses secured by said notes and deeds of trust, but not sufficient in amount to satisfy other claimed secured indebtednesses.

Such finding determines as an ultimate fact, that a deficit did remain following said foreclosures, and was unsatisfied.

Any such deficiency sum that might occur or remain by reason of said foreclosures was waived by Respondent by its Stipulation.

Finding No. 31 recites the failure of the Record to show a surplus, should the funds held by the Receiver be awarded to the Respondent; also, that there is nothing in the Record to show such surplus as having arisen from the foreclosure sale.

Such a finding connotes a conclusion by the District Court

that, "a deficiency sum did arise or remain out of or by reason of, such said foreclosure sale."

Finding No. 32 is a "finding" that is contradicted by the record herein. It appears to be an attempt to avoid the fact of an effort to satisfy unpaid indebtednesses that remained unpaid after foreclosure by reason of inadequacy of proceeds obtained by sale by foreclosure, merely by evading the term "deficiency". What is a deficiency, other than a lack of or inadequate amount of that substance necessary to accomplish the result sought? In the instant case, whether it be termed money, cash, currency, coin of the Realm or, in the vernacular, "the green stuff", no one would be misled by such selective verbiage, from recognizing the real objective sought to be identified by said Stipulation and Order of date of December 17, 1964, that is, to henceforth keep the hands of Respondent out of Appellants assets.

Finding No. 33, is a conclusion of law. It is erroneous. Respondent did, pending Bankruptcy proceedings, have the right to a Hearing before the Referee, to establish, if he could, his claim for sequestration of said funds. Respondent apparently chose not to obtain such said Hearing. Respondent pleads that he relied upon the Receivers representations. A Receiver does not represent an Alleged Debtor to the extent that said Receiver can deal away the rights of such said Alleged Debtor, by stipulation or otherwise. The record herein shows that Appellant, the Alleged Debtor herein, was at all times herein, represented by Counsel.

Affidavit of Respondent's Counsel states, "There is no

surplus, -- there was and is a substantial deficit. For this reason, the funds in the hands of the Receiver belong to and should be paid to, Community." (Tr. of Record, p. 89, lines 3-6).

**RE: DISTRICT COURT ORDER
WITHOUT EVIDENTIARY SUPPORT**

The Hearing before the District Court was upon the Referee's Certificate and papers submitted, Briefs of Counsel and Argument of Counsel, as appears from the Findings of Fact of said District Court (Tr. of Record, p. 110, lines 24-28), and the Order herein Appealed from (Tr. of Record, p. 121, lines 22-27).

The Record shows no transcript of evidence presented to the Referee, at the Hearing upon Appellant's Motion for an Order to compel the Receiver to turn over Appellant's assets to Appellant, and Respondent's counter-Motion; and Appellant submits that there was none such.

Findings Nos. 15, 16 and 31 are apparently based upon that certain affidavit by John Endicott, of Counsel for Respondent, to which reference is made in said Findings Nos. 15 and 16, to wit: "Affidavit filed November 23, 1965, page 3, lines 1-29", (Tr. of Record, p. 115, lines 8 and 9), and, "Affidavit, filed November 23, 1965, pages 2 and 3" (Tr. of Record, p. 115, lines 27 and 28). Said Affidavit appears in the Transcript of Record herein, upon pages 86, 87, 88 and 89. Said Affidavit was also presented to the Referee, at said Hearing resulting in the Referee's Memorandum re Allowances and Supplement thereto, and apparently,

the said Referee chose to disregard said Affidavit, as incompetent evidence, probably due to Objections raised thereto by Counsel for Appellant herein, at said Hearing before said Referee. Said Objections were upon "Hearsay" (Tr. of Record, p. 91, lines 17-25). Said Objections refer to page 1, lines 25 and 26 of said Affidavit. See page 86, lines 25 and 26, of the Transcript of Record herein. Said Affidavit shows on its face that the Deponent is merely reciting data, and not facts within Affiants personal knowledge. Had such related matters been within the personal knowledge of said Affiant, certainly he would not have "made an investigation to determine", as he states in said Affidavit.

Appellant directs the attention of the District Court of Appeals to "Alleged Bankrupts Reply Brief", Transcript of Record herein, pages 91, 92 and 93, including Points and Authorities cited therein.

Where examination of an affidavit discloses that statements therein are upon information and belief, such is hearsay, and not proof of the facts stated therein.

Bank of America v. Williams, 89 Cal. App. 2d 21.

Thus, we find said District Court Findings Nos. 15, 16 and 31 without evidentiary support.

RE: CONCLUSIONS OF LAW

No. 1 is clearly erroneous, and contrary to the record. The prior Order of December 17, 1964, Decreed that said

Respondent had "Waived its rights", and thereafter, estoppel would result.

No. 2. Assuming such conclusions might have been proper, as to times prior to December 17, 1964, and the inception of said Stipulation and Order pursuant thereto (which Appellant denies), the effect of said Stipulation and Order would necessitate that these "conclusions", which appear more to be "ultimate facts", be stricken as without support in the record.

No. 3. After Dismissal, the Referee does have jurisdiction to make and determine allowances, including Attorney's fees.

Referees award of balance of Receiver held funds to Appellant is mandatory, upon the face of the record herein.

No. 4. Award of funds to Appellant is required, by law.

Honoring of the \$2,000.00 assignment by Appellant was made specifically payable from out of monies to "go to Appellant". Respondent cannot complain of such directive.

Referee had jurisdiction to allow fees to Appellant's Counsel.

RE: ORDER APPEALED FROM

Paragraph 1 of said Order is made without support of and contrary to, the record herein.

No. 2. The holding as erroneous the Referee's Orders as set out therein, would properly be a "conclusion of law", however, such cannot be sustained as "the law".

A District Court cannot reverse the findings of a Referee

if there be reasonable basis in the record for such findings.

In re Arbycraft Co., 288 F. 2d 553.

No. 3. The statement that "the funds in the hands of the Receiver belong to (Respondent)", is a conclusion of law. The record fails to support such a statement. On the contra, it appears throughout the record, that title to said funds was in the Appellant, remained therein during Receiver's possession thereof, pending Bankruptcy proceedings, and was not divested therefrom up to and including the time of Dismissal of the Involuntary Petition in Bankruptcy herein. No title was ever acquired by the Respondent, prior to said Dismissal, and none such was asserted by said Respondent to and including Hearing upon Appellant's Motion for turnover Order of Appellant's assets then in possession of the Receiver, wherein Respondent sought to have said assets turned over to Respondent, on the theory of an unsatisfied creditor. The Bankruptcy Court was without jurisdiction to Hear and determine conflicting claims to those assets of the Estate of Appellant as an Alleged Bankrupt then held by the Receiver, said Dismissal having been theretofore made and entered.

A District Court must accept the Referee's findings of fact, unless clearly erroneous.

In re Sadler, 104 F. Supp. 886.

A reviewing Judge must accept Referee's findings, unless they be clearly erroneous, and where substantial evidence appears, they could not be held clearly erroneous. Gen O. 47, Sec. 53.

Rasmussen v. Grisley, 77 F. 2d 252.

TRUE ERRATA

The only genuine error to be found in the Memorandum of Allowances of the Referee is in assessing the Costs to the Estate of the Appellant. Such said Costs should have been taxed to the Petitioning Creditors, after the Dismissal.

Sec. 69, sub. b, and 50, sub. n,

Liability on Dismissal.

An alleged Debtor, whose petition against him has been Dismissed, is not liable for Costs.

In re Childs, 52 F. Supp. 89.

Upon Dismissal of an Involuntary Petition in Bankruptcy, the alleged Debtor shall recover his Costs from the Petitioner.

General Order 34, following 11 U.S.C.A. Sec. 53.

Bankruptcy Court retains jurisdiction to tax Costs to the Petitioning Creditors, where Involuntary Petition be Dismissed.

In re Childs, supra.

One unjustly petitioned into Bankruptcy can recover his Counsel fees pursuant to 78-n, upon Dismissal.

In re Childs, supra.

11 U.S.C.A. Sec. 109, Receivers taking possession shall furnish Bond. Sub. b. If Petition be Dismissed, the Court shall allow to Bankrupt, to be paid by obligors on such Bond, his Costs, Counsel fees, expenses and damages occasioned by such seizure, taking or detention of his property. Sub. n, Sec. 78, of this title. Petitioning Creditors are liable, though no Bond be given. General

Order 34, following Sec. 53, provides Costs and fees be assessed against unsuccessful parties.

In re Love B. Woods, 222 F. Supp. 161.

The District Court of Appeals will remand a matter to the Referee, or to a lower Court, with Directions to terminate the Receivership, take an accounting from the Receiver, fix his compensation, turn over to Debtor assets held by Receiver, tax Costs in accordance with the law applicable, where an Involuntary Petition in Bankruptcy is commenced, and it not be established that the alleged Debtor is in fact insolvent.

In re Terry, 97 F. Supp. 635.

In case of a Dismissal of an Involuntary Petition in Bankruptcy, Costs shall be assessed against the unsuccessful Petitioning Creditors.

In re St. Lawrence Milk Co., 9 F.2d 896.

SUBMISSION

Wherefore, Appellant submits, that the within matter should be remanded to the Bankruptcy Court, with Directions to turn over to Appellant the funds in the possession of the Receiver, to re-affirm the Referee's Memorandum re Allowances whereby fees were fixed for Counsel for Appellant, and to fix additional fees for said Counsel for Appellant by reason of this Appeal, and to tax such said fees, all Costs herein, and damages and expenses of Appellant against the Bond of the within Receiver and also

against the unsuccessful Petitioners herein, including Respondent,
all pursuant to the Statutes relevant thereto.

Respectfully submitted,

WEBB & WEBB

By: JAMES C. WEBB

Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James C. Webb

JAMES C. WEBB

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

NOV 21 1966

WM. B. LUCK, CLERK

GIBSON, DUNN & CRUTCHER

634 South Spring Street
Los Angeles, California
90014

Attorneys for Appellee

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
PRELIMINARY STATEMENT	1
SUMMARY OF FACTS	2
ARGUMENT	5
THE FUNDS IN THE HANDS OF THE RECEIVER AT ALL TIMES MATERIAL HERETO BELONGED TO APPELLEE	6
THE TAXES, ATTORNEYS FEES AND OTHER EXPENSES PAID BY APPELLEE WERE A PROPER CHARGE AGAINST SUCH FUND	12
ONLY THOSE FEES WHICH RELATE TO THE CREATION OF THE FUND SHOULD BE PAID FROM THE FUND	18
CONCLUSION	24
CERTIFICATE	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
American Trust Co. v. England 9th Cir. (1936) 84 F.2d, 352	11
Associated Company v. Greenhut 3rd Cir. (1933) 66 F.2d 428	11
First Western Savings & Loan v. Anderson (1958) 252 Fed.2d 544	21
In re Hotel St. James (1933) 65 F.2d 62	8
In re: Wakey 7th Cir. (1931) 50 F.2d 869	11
In re: Williams Estate, 9th Cir. (1907) 156 Fed. 934	19
Mortgage Loan Company v. Livingstone (8th Cir. 1930) 45 F. 2nd 28	8 ,24
Penziner v. West American Finance Co. (1937) 10 Cal.2nd 160	16 ,17
Textile Banking Co. v. Widener 4th Cir. (1959) 265	19 ,21

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,
Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,
Appellee.

APPELLEE'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court granting Appellee's Application for Review of an order of a Referee in Bankruptcy which order made certain allowances from funds in the hands of the Receiver and which further provided that the balance of such funds should be returned to the alleged bankrupt. The order granting the Application for Review disallowed the said allowances and awarded the funds in the hands of the Receiver to Appellee. (R.pp. 121-122)

SUMMARY OF FACTS

The alleged bankrupt, Denco Development Co., (hereinafter sometimes referred to as "Denco") constructed a number of apartment buildings in Orange County, which construction was financed by appellee. (Fdg. 1, R.p.110) In September of 1964 Denco was in default on the 101 loans here involved with a total balance due of approximately \$3,750,000. Appellee had initiated foreclosure proceedings under its deeds of trust and the trustee sales under such foreclosure proceedings were scheduled for September 30, 1964 at 11:00 a.m. as to 29 of the deeds of trust and for the week of October 12, 1964 as to the remaining deeds of trust. (Fdg. 2, R.p.111) On September 29, 1964 an involuntary petition in bankruptcy was filed against Denco (R.p.2) and the referee issued a temporary restraining order at 4:00 p.m. that same day restraining appellee from proceeding with the 29 sales set for the following morning. (R.p.7)

Appellee obeyed the temporary restraining order and postponed the scheduled sales. Appellee opposed the continuing in effect of the temporary restraining order each time the matter came on for hearing (Fdg.5, R.p.111) but said temporary restraining order was nevertheless continued in effect until December 17, 1964. (Fdg.7, R.p.112). On October 5, 1964, less than one week after being served with the temporary restraining order, appellee filed its

Application for Order re Sequestration of Rents. (R.p.26)

As set forth in said application, the deeds of trust expressly assigned to appellee as additional security the rents, issues, and profits arising from the real properties subject thereto. Appellee requested the referee to direct the receiver to sequester all rents, issues, and profits arising from the property and to hold them for the benefit of appellee. On October 7, 1964, the referee issued an order to show cause re sequestration of rents which covered the 29 deeds of trust hereinbefore referred to. (R.p.28) Thereafter, on October 23, 1964, a stipulation between the receiver and appellee was filed, and the referee made an order, providing that any decision of the referee concerning either the sequestration of rents or appellee's right to proceed with its foreclosure sales should apply to all 101 loans, not merely the 29 first mentioned. (Fdg.8,R.p.112)

While no formal order was made by the referee on the question of the sequestration of rents, the matter was presented to him in open court and in the presence of the alleged bankrupt and its attorney of record. At that time the receiver represented to the referee that the funds arising from the rental of the properties covered by the deeds of trust would be used by the receiver solely for operating such properties and the payment of his costs and fees, and the balance would be held for the benefit of

appellee and would not become part of the general assets of the alleged bankrupt's estate. This procedure was acceptable to appellee and no objection thereto was made by either the referee or the alleged bankrupt. (Fdg.11, R.p.113) Thereafter, on December 17, 1964, appellee and Denco stipulated, and the referee so ordered, that the temporary restraining order of September 29, 1964 could be dissolved and appellee allowed to proceed with its foreclosure sales under its deeds of trust. (Fdg.14, R.p.114) Appellee agreed to waive any right it might have to recover any deficiency judgment under its deeds of trust.

Appellee did thereafter proceed with its foreclosure sales and acquired the properties at such sales. The total amount bid on behalf of appellee consisted of the principal amount due, the interest thereon, and the trustee's fees and expenses relating to said sales. However the amount bid by appellee did not include other items which were secured by said deeds of trust, consisting of the fees paid by appellee to its appraiser in connection with appellee's efforts to secure the dissolution of the temporary restraining order, which fees amounted to \$6,000, the fees paid by appellee to its attorneys in connection with their efforts to obtain the dissolution of the temporary restraining order and the sequestration of rents, which fees amounted to \$5600, and the default charge

of one-fifth of 1% on the unpaid balance, which amounted to some \$7500. The total of said three items not included in the bid was \$19,100, which sum exceeded the amount in the hands of the receiver for distribution. (Fdg. 16, R.p.115) The funds held by the receiver amounted to something in excess of \$11,000 after certain allowances not here involved. (R. pp. 95-97)

ARGUMENT

The District Court held that the funds in the hands of the receiver which arose from the operation of the improved properties encumbered by the deeds of trust under which appellee was the beneficiary, were held by said receiver for the benefit of appellee subject only to the expenses and fees of said receiver and those services which contributed to the creation of said fund. The District Court further held that appellee was in constructive possession of the property secured by the deeds of trust. (Concl. 2, R.pp.118-119) Appellee submits that the order of the District Court should be affirmed for three separate and independent reasons:

1. The funds in the hands of the receiver were at all times material hereto the property of appellee, subject only to the fees and expenses of the receiver, and accordingly, such funds should have been paid to

appellee regardless of the merits of its claims concerning its right to recover the taxes, attorneys' fees and other expenses incurred by it.

2. Assuming solely for the purposes of this argument that the funds were not the property of appellee, still appellee is entitled to recover the taxes, attorneys' fees and other expenses incurred by it which were secured by the express terms of the deeds of trust and which were not included in the amount bid by appellee at the foreclosure sale.

3. Finally, a portion of the appraisal fees were paid prior to the foreclosure sales and all of said appraisal fees, as well as the major portion of the attorneys' fees, were for services rendered prior to the foreclosure sale and appellee should be reimbursed for those items in any event.

I

The Funds in the Hands of the Receiver at All Times Material Hereto Belonged to Appellee

There is no question that all the funds in the possession of the receiver arose from rents collected by the receiver from the improved properties which were mortgaged by the alleged bankrupt to appellee.

The deeds of trust covering these pro-

perties provided that, in the event of any default in payment of any obligations secured by such deeds of trust, appellee might at any time without notice either in person, by agent, or by receiver, and with or without taking possession, collect such rents, issues, and benefits, and apply the same, less costs and expenses of operation and collection, to the obligation secured by such deeds of trust.

There is no question that it is the general rule that rents do not belong to a mortgagee unless the property has been reduced to the possession of the mortgagee. However, in the instant case, appellee was in the process of obtaining possession of the property, and would have reduced said property to its possession but for the temporary restraining order issued by the referee. Appellee could not proceed with its foreclosure sales as the result of this order and it could not have a receiver appointed to take possession for it because a receiver had already been appointed by the referee and was in possession. Appellee did the only thing it could, which was to apply to the referee to have the rents collected by the receiver sequestered for the benefit of appellee. While no formal order was ever made requiring the receiver to sequester such rents for the benefit of appellee, the receiver represented

to the court that he would apply the receipts from the property to the expenses of operation and to his own fees and services, but that he would hold the balance for the benefit of appellee. Appellee respectfully submits that in this situation there is no question that the funds in the hands of the receiver were held by him for the benefit of appellee and he was, in fact, acting as the agent of appellee in this connection.

A case remarkably similar to the instant situation is that of Mortgage Loan Company v. Livingstone (8th Circuit 1930), 45 F.2d 28, which was cited with approval by this Court in the case of In re Hotel St. James (1933) 65 F.2d 62. In the Mortgage Loan case, the mortgagee had commenced foreclosure proceedings and a sale was set, but an involuntary petition in bankruptcy was filed two days prior to the scheduled sale, and a receiver was appointed and the foreclosure sale enjoined. As in our case, the mortgagee repeatedly sought to have the injunction lifted, but the injunction was kept in force for several months. The mortgagee also filed a petition to have the rentals applied in accordance with the mortgage, but this petition was never formally passed upon by the court, although the receiver informally agreed with the mortgagee that he would so apply the rents. Ultimately, the court permitted the mortgagee to sell the property and there was a deficit

upon such a sale. The mortgagee sought to obtain from the receiver the funds he had on hand which arose from the rents from the mortgaged property less whatever allowance might be made by the court to the receiver for his services. The court denied this request, although it did award the mortgagee the amount of the taxes which had not been paid by the receiver. This order was reversed by the court on appeal, which held that the mortgagee was entitled to the funds in the hands of the receiver. In reaching this conclusion, the court pointed out that it recognized the general rule that a mortgagee was not entitled to rents until he took possession, either in person or by receiver, but went on to note that in this case the mortgagee had been enjoined by the court from enforcing its rights under the mortgage and that the mortgagee had done all it could under the circumstances. The following statement by the court is equally applicable to the instant case.

" . . . They were, of course, unable to take possession of the property from the receiver, except on an order of court, and the record in this case warrants the conclusion that the receiver was acting not only on behalf of the general creditors, in so far as this property was concerned, but was acting also in



"behalf of these mortgagees, and he collected
and impounded these pledged rents and issues,
keeping them separate from his other accounts
for apparently no other purpose than to make
them available as a part of the security un-
der this second mortgage. By carrying on the
business of this hotel company through a re-
ceivership, the court assumed the burden of
administering the property and collecting the
income therefrom for the benefit of whomsoever
was entitled thereto. This is not a case where
the mortgagor was permitted to remain in
possession of the property and to receive and
disburse the earnings, but is a case where a
receiver was appointed, who, at the demand
of the mortgagees, collected, impounded, and
separately kept these funds. He was their
receiver, and nothing was done by him with
these funds during his stewardship inconsis-
tent with their application to a discharge of
the pledge, and hence it cannot be said that
the mortgagees are precluded from asserting
their rights thereto by having remained silent,
or by having acquiesced in the possession of
the property and the collection of the income

"by the receiver, because they were not collected for purposes other than the satisfaction of the mortgage debt." (emphasis added)

A similar result has been reached in other circuits, including this one.

American Trust Co. v. England

9th Cir. (1936) 84 F.2d, 352.

Associated Company v. Greenhut

3rd Cir. (1933) 66 F.2d 428.

In re: Wakey

7th Cir. (1931), 50 F.2d 869.

The District Court determined that appellee was attempting to obtain funds which were held for its benefit by the receiver at all times during the pendency of the bankruptcy proceeding, pursuant to the application for sequestration of rents filed by appellee and the representation and stipulation made by the receiver that he was holding such funds for the benefit of appellee, after the payment of the receiver's fees and expenses. Said court further determined that the action of the appellee in filing the application for the sequestration of rents collected by the receiver was sufficient to impose on the receiver an obligation to preserve the net income for appellee and was all that appellee could do in the circumstances to protect and enforce its

rights in said rentals. (F.32 and 33 R.p.118) This determination was the only proper holding under the facts of this case and under the above-mentioned authorities.

II

The Taxes, Attorneys Fees and Other Expenses Paid by Appellee Were a Proper Charge Against Such Fund

As set forth above, it is the position of appellee, and the holding of the District Court, that the funds collected by the receiver were collected by him for and on behalf of appellee and that such funds therefore were and are the property of appellee and should be delivered to appellee without regard to the question of what credit or credits appellee should give to the alleged bankrupt for such collections and what charges could properly be made by appellee against such funds. However, if this Court should disagree with that position, then nevertheless appellee respectfully submits that it is still entitled to said funds as reimbursement for expenses paid by appellee which were secured by the deeds of trust and which were not included in the amount paid at the foreclosure sales.

Among other things, the deeds of trust provided that they were security for the performance of each

agreement of the trustor contained therein. (Fdg. 15, R.p.114) One of the agreements of trustor expressly set forth in said deed of trust is the agreement to pay before delinquency all taxes and assessments affecting the property. Neither the receiver nor the alleged bankrupt paid the real property taxes for the tax year 1964-1965 although such taxes became a lien on July 1, 1964 and the first installment thereof was due and payable on November 1, 1964. Appellee was required to pay said taxes at a date subsequent to the foreclosure sales, in a sum in excess of \$78,000. (R.p.87) We submit that there was, if nothing else, an equitable lien on the funds collected by the receiver for the amount of taxes paid by appellee.

The deeds of trust further provided that the trustor would pay all costs and expenses, including attorneys' fees, in any action or proceeding in which the beneficiary or the trustee might appear for the purpose of protecting or enforcing the security of the deeds of trust and the obligations secured thereby. As a result of the filing of the proceeding and the issuance of the order restraining appellee from proceeding with its foreclosure sales, it was necessary for it to retain attorneys to protect and enforce its security. While it is true that appellee did not pay its attorneys

until a date subsequent to the foreclosure sales, nevertheless it is equally true that appellee was required to retain attorneys and incur an obligation for their fees prior to the foreclosure sales and that such services were expressly directed to protecting and enforcing the security of the deeds of trust and the obligations secured thereby. Appellee paid its attorneys the sum of \$5600 for these services during the month of March, 1965.

(R.p.88)

The principal issue presented to the referee in connection with enjoining appellee's foreclosure sales was whether there was any equity in the properties or whether the loans secured by the deeds of trust exceeded the fair market value of the properties. The petitioning creditor and the alleged bankrupt both took the position that there was an equity in the property, whereas appellee at all times correctly alleged that there was no such equity. Appellee retained the firm of Marshall and Stevens to appraise the properties and when said firm was finally allowed to testify as to the results of its appraisal, it testified to a value less than the amount of the loans. The appraiser selected by the receiver also ultimately testified to a value less than the amounts secured by the deeds of trust. Very complete and well documented appraisal reports were pre-

pared by Marshall and Stevens and were submitted in evidence at the time of their testifying. Appellee paid said firm the sum of \$6,000 for their services in connection with such appraisals. (R.p.88) While we do not consider it significant, we would point out that the sum of \$4,000 was paid to said appraisers on November 25, 1964, a date prior to the foreclosure sales, and the balance of said fee amounting to \$2,000 was paid at a date subsequent to said foreclosure sales. We would also submit that the attorneys' fees and appraisers' fees which total \$11,600 are reasonable in view of the amount of services rendered and also in view of the amounts due under the deeds of trust, some \$4,000,000. We would also note that the services of appellee's attorneys in connection with the hearing before the referee on the question of who should receive the funds in the hands of the receiver, and their services in connection with the application for review and this appeal, are also covered by the provisions of the deed of trust and are "for the purpose of protecting or enforcing the security" and an additional fee for these services would be a proper charge against the funds in the hands of the receiver.

As mentioned above, appellee believes that the fact that a portion of said fees were paid prior to the

foreclosure sales and the balance paid thereafter is irrelevant, although the referee was apparently of the opinion that any sums paid by appellee after the foreclosure sales were paid by it as "purchaser" and not as "beneficiary" under the deeds of trust. In his memorandum of November 30, 1965, the referee has cited the case of Penziner v. West American Finance Co. (1937), 10 Cal.2nd 160. This case was also cited by the alleged bankrupt in his memorandum to the referee on this issue, but we submit that the case actually supports appellee's position that its attorneys fees and appraisal fees are a proper charge against the funds in the hands of the receiver.

The Penziner case actually involved a question of whether or not usurious interest had been charged a borrower and in order to make this determination it was necessary for the court to determine whether certain charges made by the lending institution at the time of the foreclosure sale were proper charges. One of the charges made was for the services of attorneys required in connection with defending mechanic liens' suits involving the property. The record disclosed that the services rendered by the attorneys were rendered subsequent to the foreclosure sale and the California Supreme Court commented that there was no evidence that the trustee or the lending institution as beneficiary had

paid the costs or attorneys fees "or became liable for any costs or attorneys fees prior to said sale" on account of the mechanics lien action (p. 180). The court further noted that a sum paid for legal services in connection with the foreclosure of the deed of trust was a proper charge and one properly paid from the proceeds of the trustee's sale and one which should have been allowed by the trial court. We submit that the Penziner case is authority for the proposition that where the beneficiary has become liable for costs or attorneys fees prior to the foreclosure sale, that the sums so paid are a proper charge against the funds resulting from the trustee's sale, even if actual payment is not made by the beneficiary until a date subsequent to such sales. Accordingly, even under the authority relied upon by the referee and the alleged bankrupt, the sum of \$11,600 was unquestionably a proper charge against the funds in the hands of the receiver.

Finally, each of the promissory notes here involved provides that the holder may charge and the maker agrees to pay up to one-fifth of 1% on the unpaid balance for each default, with a minimum of \$10 for each default. The unpaid principal balance on all of the notes at the time of the defaults was approximately \$3,750,000 and one-fifth of 1% of that amount is \$7500. (R.p.88)

No part of this sum was included in the bids at the foreclosure sales and accordingly said amount remains unpaid and a proper charge against the funds in the hands of the receiver.

III

Only Those Fees Which Relate to The
Creation of the Fund Should be Paid
From the Fund.

The referee ordered that the attorney for the alleged bankrupt should be paid the sum of \$2,150 out of the funds in the hands of the receiver. This payment was to be for the legal services rendered by him to the alleged bankrupt. Appellee respectfully submits that this award was improper, as determined by the District Court, and that the only awards which should be made out of said fund were to those whose services helped create such fund. The services of the attorney for the alleged bankrupt in no way contributed to the creation of that fund and should not be charged against such fund.

It is the general rule that the fees for the attorneys for the petitioning creditor, for the bankrupt, and for the receiver or the trustee, are regarded as expenses of general administration and are not deductible from the proceeds payable to a lienor unless

such services directly related to the preservation of the property subject to such lien. In this connection two potentially conflicting approaches are balanced: (1) The cost of protecting a fund in court is recognized as a dominant charge on that fund; (2) Administrative expenses in bankruptcy should be borne by the estate and a lien holder is entitled to the full value of his security, if possible, unimpaired by the bankruptcy litigation.

In re: Williams estate, 9th Cir. (1907)

156 Fed., 934.

Textile Banking Co. v. Widener

4th Cir. (1959), 265.

In the Williams case, the claimant had made various loans to the bankrupt which were secured by certain chattel mortgages upon the contents of the bankrupt's place of business. This equipment was sold by the receiver and in his account the receiver charged against those funds certain expenses, including a fee for the receiver and his attorney as well as certain expenses relating to the operation of the business of the bankrupt. The lien claimant objected to the allowance of those expenses, but they were allowed by the District Court; upon appeal, this Court stated the applicable rule as follows:

" . . . By coming into the bankruptcy court, therefore, the holder of a valid

"lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would

"unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of "Stewart v. Platt, 101 U.S. 731, 739, 25 L. Ed. 816; In re Utt, 105 Fed. 754, 45 C.C.A. 32; In re Prince & Walter (D.C.) 131 Fed. 546, 552; In re Bourlier Cornice & Roofing Co. (D.C.) 133 Fed. 958, 963; Loveland on Bankruptcy (3d Ed) P. 775. See also, Collier on Bankruptcy (6th Ed.) p. 497." (emphasis added)

This decision was cited by this Court more recently, with approval, in the case of First Western Savings & Loan vs. Anderson (1958) 252 Fed.2d 544, 547. In the Textile Banking Company case, supra, this same rule was more recently stated by the 4th Circuit Court of Appeals. In that case, encumbered property was sold by the bankruptcy trustee and certain charges were properly allowed against the security fund covering costs in connection with the sale and the protection of the property pending the sale. However, an additional charge was allowed against the fund and in reversing such allowance, the Circuit Court stated the applicable

rule as follows:

". . . But where the Trustee has elected to sell the encumbered property he cannot intrench upon the amount of the secured debt for the payment of any of the expenses of administration, such as commissions and similar costs. Such costs can be taken only out of any surplus realized over and above the amount necessary to pay the secured debt. As stated in Remington on Bankruptcy, Sect. 2609; 'It is well settled that, ordinarily, general bankruptcy administration expenses are not chargeable against proceeds from the sale of assets covered by the mortgages or liens to the detriment of the lienholder or secured creditor.'"

"And in 6 Am. Jr. p. 1511, Sect. 1689, we find: 'A secured creditor need bear only the costs of enforcing his rights and the necessary expenses incurred in the preservation of the property pledged for the debt. A lien holder is not to be divested of his rights in the security by an allowance of commissions and other expenses, where the services for which they are allowed have no

"'relation to the security.'"

"And this appears to be the rule whether the sale by the trustee was consented to by the lienholder or not."

"In such a case the fund on which the debt is secured cannot be intrenched upon except for payment of the actual costs of selling the property, plus in some circumstances the expense, if any of preserving the encumbered property pending the sale."

The rule established by these cases is clear: A bankruptcy trustee or receiver takes property subject to existing liens and he cannot impair or deplete that lien by expenses which do not directly contribute to the protection and preservation of the lien property. Certainly no claim can be made that the charges of the attorney for the alleged bankrupt in any way preserved or protected the lien property.

The District Court found that the payment to the attorney for the alleged bankrupt was for the services rendered by him to the alleged bankrupt and that there was no indication in the record that such services in any way contributed to the creation or the preservation of the funds in the hands of the

receiver. At the hearing before the District Court, the attorney for the alleged bankrupt waived the opportunity offered to him to present further evidence for the purpose of establishing if his services did contribute to the creation of the funds in the hands of the receiver. (Fdg. 30, R.117)

Finally, the attorney for a bankrupt is normally entitled only to a modest fee for preparing the schedules in bankruptcy, not for all the services he may have rendered to the bankrupt. Therefore, even if this Court should disagree with the District Court and determine that the attorney for the bankrupt is entitled to some fee out of the funds in the hands of the receiver, the fee of \$2150 awarded by the referee was too high in any event.

CONCLUSION

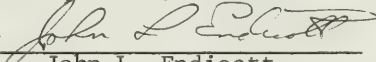
Appellee submits that the authorities hereinbefore cited establish beyond any question that the decision of the District Court was correct and that the rents collected by the receiver were collected by him for the benefit of appellee, were the property of appellee, and were not the property of the alleged bankrupt. As stated by the 8th Circuit Court of Appeals in the Mortgage Loan case, supra, at page 34,

"such funds never became a part of the bankrupt estate and are therefore not subject to any claims for fees which might otherwise be made against assets of the bankrupt estate." Even if this Court should conclude that the funds were not actually the property of appellee, then nevertheless appellee is entitled to receive from that fund reimbursement for those items which were not included in its bids at the foreclosure sales. These unreimbursed items include the sum of \$5600 incurred and paid as attorneys' fees, plus an additional fee for their services in connection with the Application for Review and this appeal, the sum of \$6,000 incurred and paid as appraisal fees, and the default charge of one-fifth of 1% of the unpaid balances amounting to \$7500. Finally, said fund should not be charged for any services rendered by the attorney for the alleged bankrupt.

WHEREFORE, appellee submits that the order of the District Court granting the Application for Review and reversing portions of the referee's orders should be affirmed.

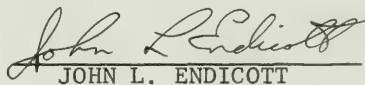
Respectfully submitted,

GIBSON, DUNN & CRUTCHER

By 
John L. Endicott

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN L. ENDICOTT

N O. 2 1 0 2 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO.,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN.,

Appellee.

PETITION FOR REHEARING

FILED

MAY 17 1967

WM. B. LUCK, CLERK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WEBB & WEBB

612 Jergins Trust Building
Long Beach, California 90802

Attorneys for Appellant

N O. 2 1 0 2 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO. ,
a corporation,

An Alleged Bankrupt,
Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN. ,
Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WEBB & WEBB

612 Jergins Trust Building
Long Beach, California 90802

Attorneys for Appellant



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMCO DEVELOPMENT CO. ,
a corporation,

An Alleged Bankrupt,

Appellant,

vs.

COMMUNITY SAVINGS & LOAN ASSN. ,

Appellee.

PETITION FOR REHEARING

Appellant pleads for REHEARING herein:

The Decision rests upon incompetent evidence, which the Reviewing Court erroneously accepted as sufficient, inasmuch as the District Court had predicated its findings thereon.

The Bankruptcy Court and the District Court was without Jurisdiction of the property subject matter herein; that is, without Jurisdiction to adjudicate the title thereto.

The right to the possession of the said subject property was, at the time of the Referee's Memorandum Decision, and at all times subsequently, not a controversy within the then

jurisdiction of the said Referee nor the District Court, as the alleged Bankrupt was theretofore Discharged out from said Bankruptcy Court without having been adjudicated a Bankrupt; and, the prior Order in said District Court rendered the issue res judicata, and not subject to re-determination.

Erroneous conclusions of law, by the District Court, and confirmed by the Decision, that, 1) The rents were the property of Appellee at all times during the course of these proceedings; 2) The funds were not a part of the alleged Bankrupt estate; 3) There was in fact, no deficiency, as we understand that term to have been used in the stipulation; 4) The Order pursuant to stipulation and the stipulation for the Order are insufficient to estop Appellee to claim the rents; 5) Relying upon the Mortgage Loan case, wherein there was an adjudication of Bankruptcy, and also recovery allowed pursuant to a deficiency, as authority for the within Decision; 6) That an Order for sequestration would have given to the Appellee greater rights than he had without such Order.

Said Decision, as to each point hereinbefore set out, is not in accord with the law as decreed by the State of California, nor by those cases in point by the United States Courts. Property rights are generally recognized in accordance with those laws applicable to the subject property where the same be situate; this precept is particularly appropos when the said property be a landed estate. To adjudicate contrawise would result in a deprivation of a persons property without due process of law, as secured

to all citizens by our State and also our Federal Constitutions.

The Record herein fails to support the Decision, either of the facts concluded, or as to the laws to be applied, as the same are now concluded and applied, by this Decision.

WHEREFORE, Appellant prays for Rehearing to permit further demonstration of the errors as alleged hereinbefore.

Respectfully submitted,

WEBB & WEBB

By: JAMES C. WEBB

Attorneys for Appellant.

CERTIFICATE

I hereby certify, as an officer of the above Court, that the within Petition is filed in good faith, that the same is well taken, and is not done for the purpose of delay.

/s/ James C. Webb

JAMES C. WEBB

No. 21030 ✓

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff,

VS.

MERLE W. MOORE,

Defendant.

Appeal of Lewis Roca Scoville Beauchamp
& Linton and Harold R. Scoville, as
collateral parties.

Brief of Appellants

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON
and HAROLD R. SCOVILLE

By JOHN P. FRANK
PAUL G. ULRICH

114 West Adams Street
Phoenix, Arizona

Attorneys for Appellants

FILED

JUL 20 1966

WM. B. LUCK, CLERK

NOV 4 1966

TABLE OF CONTENTS

	Page
Jurisdiction	1
Statement of Facts.....	2
Specifications of Error.....	6
Questions Presented	6
Summary of Argument.....	6
Argument	8
I. The District Court's Order of March 29, 1966 Is an Appealable Order	8
II. It Was Improper for the District Court to Conduct Summary Proceedings to Require That Appellants Turn Over the Files That Are Sought.....	10
III. Even Assuming That Under Some Circumstances Claim- ant Would Be Entitled to the Production of the Files, No Appropriate Showing of Need Has Been Made Here	12
IV. The Scope of Discovery Permitted by the Federal Rules of Criminal Procedure Does Not Extend to the Present Demand	15
Conclusion	17

TABLE OF AUTHORITIES

CASES	Pages
Application of Longhorne, 105 N.Y.S.2d 788 (Sup. Ct. 1951) ..	11
Bowman Dairy Co. v. United States, 341 U.S. 214, 71 Sup. Ct. 675, 95 L.Ed. 879 (1951).....	16
Brown v. Superior Court, 78 Ariz. 120, 276 P.2d 540 (1954)....	11
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541. 69 Sup. Ct. 1221, 93 L.Ed. 1528 (1949).....	6, 8, 9, 10
Gluckman v. Indig, 161 Misc. 726, 292 N.Y.S. 791.....	12
In re Gluckman, 250 App. Div. 989, 296 N.Y.S. 989 (1937)....	12
Hickman v. Taylor, 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451 (1947).....	7, 13, 14
In re Long, 287 N.Y. 449, 40 N.E.2d 247 (1942).....	11, 12
In re Magnus, Mabee & Reynard, Inc., 311 F.2d 12 (2d Cir. 1962), 373 U.S. 902, 83 Sup. Ct. 1289, 10 L.Ed. 2d 198 (1963)	16
Marco v. Sachs, 109 N.Y.S.2d 224 (Sup. Ct. 1951).....	14, 15
Overby v. United States Fidelity & Guaranty Co., 224 F.2d 158 (5th Cir. 1955).....	7, 9
Societe Internationale, etc. v. Rogers, 357 U.S. 197, 78 Sup. Ct. 1087, 2 L.Ed.2d 1255 (1958).....	16
Tomlinson v. Florida Iron & Metal, Inc., 291 F.2d 333 (5th Cir. 1961)	9
United States v. Abrams, 29 F.R.D. 178 (S.D.N.Y. 1961).....	16
United States v. Ferguson, 37 F.R.D. 6 (D.D.C. 1965).....	16
United States v. Hanlin, 29 F.R.D. 481 (W.D. Mo. 1962).....	16
United States v. Palermo, 21 F.R.D. 11 (S.D.N.Y. 1957).....	16
United States v. Smith, 209 F.Supp. 907 (E.D.Ill. 1962).....	16
United States v. Van Allen, 28 F.R.D. 329 (S.D.N.Y. 1961).....	16

STATUTES AND RULES

Pages

Federal Rules of Criminal Procedure:

Rule 16	8, 16, 17
Rule 17(c)	8, 12, 16, 17
Rule 30(b)	15
18 U.S.C. Sec. 3231	2
28 U.S.C. Sec. 1291	2, 6, 8
28 U.S.C. Sec. 1294	2

OTHER

Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 999-1000 (1961)	10
4 Moore, Federal Practice	10
Some Reflections on the Termination of the Attorney Client Relationship, 44 Mass. L.Q. 41 (Oct. 1959)	15

No. 21030

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MERLE W. MOORE,

Defendant.

Appeal of Lewis Roca Scoville Beauchamp
& Linton and Harold R. Scoville, as
collateral parties.

Brief of Appellants

JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of Arizona on March 29, 1966 (T. 45), in the case of United States of America vs. Merle W. Moore, No. C-16857 Phx., and from the order denying the motion for rehearing, entered on April 18, 1966. This order required appellants to make available to counsel for defendant Moore all of appellants' files pertaining to the case of United States v. Moore, subject to certain con-

ditions. Jurisdiction of this court is based on 28 U.S.C. Secs. 1291 and 1294. Jurisdiction of the district court in the action against Mr. Moore is based upon 18 U.S.C. Sec. 3231, but it is contended that the district court had no jurisdiction to enter its order against appellants, and that its order should be set aside for that reason. The court's order denying appellants' motion for rehearing allowed ten days within which to appeal. The notice of appeal and bond for costs on appeal were timely filed on April 28, 1966. (T. 51-52)

STATEMENT OF FACTS

On February 18, 1964, the Grand Jury for the District of Arizona indicted Merle W. Moore for wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar years 1957 and 1958. (T. 1-3) Prior to the commencement of this action, appellants had been employed by Mr. Moore to represent him in connection with the investigation of his federal income tax returns. During the course of this employment, appellants received from the defendant Moore various documents and papers relating to the inquiry by the Internal Revenue Service, and began the preparation of materials for his defense.

Appellants rendered statements for legal services and cash advances to Mr. Moore in the total amounts of \$5,013.00 and \$541.05 respectively, on which he paid the sum of \$574.73, leaving a balance of \$4,997.32 which is presently due, owing and unpaid. Orally on September 27, 1963 and in writing on October 2, 1963, appellants advised Mr. Moore that they were not willing to do further legal work until statements for legal services rendered prior to that date were paid in full. At that time Mr. Moore had paid nothing

on account of statements rendered since October, 1962. (T. 22-23) Subsequently, it is believed that defendant retained W. Thomas Holmes, of Tucson, and H. M. Wales of Phoenix, as counsel. Appellants agreed to deliver the defendant's file in its entirety to Holmes and Wales upon their representation that the delinquent fees would be paid and the attorneys undertook to make arrangements to secure this payment. However, Mr. Moore failed to pay Holmes and Wales for legal services that they had rendered on his behalf. Thereupon, they also withdrew from representation and returned to appellants their original file, retaining only their own work papers and memoranda.

Mr. Philip Shea was then retained by Mr. Moore. On January 18, 1966, Mr. Shea filed a motion for order to show cause, which was followed by an order to show cause, issued by the district court and directed to W. Thomas Holmes, why he should not be ordered to turn over all files and papers relating to the case to the defendant or his attorney. (T. 10) On February 4, 1966, the court ordered that the files in the possession of Mr. Holmes be turned over to Mr. Shea, and Mr. Shea acknowledged that Mr. Holmes had fully complied with the order of the court. (T. 12)

As previously noted, however, the bulk of the files in Mr. Holmes' possession had been previously returned to appellants. Mr. Shea then petitioned on February 4, 1966 for an order to show cause why appellants should not turn over to him all files in their possession which belonged to Mr. Moore and which pertained to the action. (T. 13) The response to this order to show cause stated that all books and records belonging to Mr. Moore had been previously redelivered to Mr. Shea, and that Mr. Shea was now seeking the other items in the file that had never been the property of Mr. Moore. These materials consist of handwritten nota-

tions, computations and informal office memoranda prepared by appellants, copies of correspondence by appellants and correspondence received from various third persons, a copy of the transcript of testimony given by Mr. Moore to a Special Agent, medical reports concerning Mr. Moore, a copy of a brief prepared by Samuel J. Lanahan, and copies of pleadings and orders in the proceedings in district court. (T. 43-44)

On March 21, 1966, the order to show cause came on for hearing. The district court ordered:

"That Lewis Roca Scoville Beauchamp & Linton and Philip Shea review the file in custody of said firm and that said firm deliver to Mr. Shea those instruments which, in the opinion of Mr. Shea, he believes to be necessary to the defense of the defendant, within 10 days from this date. At the conclusion of this case or termination of the services of Mr. Shea, those instruments currently in possession of Lewis Roca Scoville Beauchamp & Linton will be returned to that firm. This in no way shall affect the obligation of the defendant to pay the firm of Lewis Roca Scoville Beauchamp & Linton for the services rendered." (T. 61)

The formal order, from which this appeal is taken, was filed on March 29, 1966. (T. 45-46) This order, which is taken to supersede the minute entry of March 21, 1966, consists of the following:

"ORDERED that the respondents make available to counsel for the defendant all of the defendant's files pertaining to this case subject, however, to the following terms and conditions:

"The defendant's counsel may borrow from the files any papers which he regards necessary to the preparation of a proper defense of the defendant not including legal memoranda prepared by respondents; that the defendant's counsel maintain all papers which he bor-

rows pursuant to this order separate from all other papers in his file and that he return such borrowed papers to the respondents upon the conclusion of this case and the defendant's counsel advise the defendant of his obligation to pay the obligation of attorneys' fees owing to respondents."

Appellants were required to comply with this order on or before April 1, 1966. On April 1, 1966, however, appellants filed a motion for rehearing, (T. 22), that was denied on April 11, 1966. (T. 62) The next day, however, the district court vacated that order and reset the motion for rehearing for April 18, 1966. On that date the motion was argued and then denied. Ten days were given within which to appeal the order of March 29, 1966. (T. 62) Notice of appeal and bond for costs on appeal were timely filed in April 28, 1966. (T. 51-52) Execution of the order of March 29, 1966 has been stayed pending the determination of this appeal. (T. 62)

From this chronology, it is apparent that appellants are not parties to the main action, United States v. Merle W. Moore, in the United States District Court for the District of Arizona. Rather, appellants are bystanders who have been brought into that case for the sole purpose of obtaining their work product and other records for purposes of preparation of the defense of Mr. Moore. And, it should be also observed that although Mr. Shea is the nominal party seeking to obtain the records in question, his claim is derivative in the sense that he is seeking to obtain the file on behalf of his client, Mr. Moore, and his rights are only those of his client. Accordingly, the claim should be treated as being in actuality that of Mr. Moore for purposes of this appeal.

SPECIFICATIONS OF ERROR

1. The district court erred in conducting summary proceedings to require that appellants turn over the files that are sought in that no attorney-client relationship existed between appellants and Mr. Moore at the time of those proceedings.

2. The district court lacked jurisdiction to conduct these summary proceedings since there are no statutes or rules of criminal procedure that permit them.

3. The district court erred in determining that sufficient showing of necessity and good cause had been made by appellee to support a determination that there was a proper claim to the files that are sought.

QUESTIONS PRESENTED

1. Was it proper for the district court to conduct summary proceedings in this action to require that appellants turn over the files that are sought?

2. Was any proper showing of necessity and good cause made by appellee in proceedings before the district court to support a determination by that court that there is a proper claim to the files that are sought?

3. Has appellee demonstrated any proper claim to the files that are sought?

SUMMARY OF ARGUMENT

The district court's order of March 29, 1966, requiring appellants to turn over the files that have been sought by claimant is an appealable order under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 69 Sup. Ct. 1221, 93 L.Ed. 1528 (1949). This doctrine allows appeal from orders under 28 U.S.C. Sec. 1291 where the order determines a claim of rights separable

from and collateral to other rights asserted in the action that are too important to be denied review and too independent of the main case itself to require that appellate consideration be deferred until after the adjudication of the entire case. The collateral order doctrine has been applied in numerous contexts and has been specifically applied in the discovery context in the case of *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955).

The district court erred in conducting summary proceedings in this matter, because there was present no attorney client relationship between appellants and the claimant at that time. The files are not the property of the claimant, have not been refused in bad faith, or in violation of professional ethics, and accordingly the claimant should pursue whatever remedy he may have in an action at law. Summary proceedings should be approached with extreme caution and where there is doubt as to their propriety, the petitioner should be left to his remedy in ordinary legal proceedings.

Even assuming that under some circumstances the scope of the defendant's discovery power would reach items in the hands of third parties, no proper showing has been made here to warrant the district court's order. The situation of the demand by a former client of the files of his former attorney is directly analogous to the work product doctrine applied to discovery of materials of an attorney by adverse parties. *Hickman v. Taylor*, 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451 (1947), holds that in order to obtain materials in the hands of a respondent's attorney even where no attorney-client or professional privilege exists, a proper showing of necessity, prejudice and good cause is required. No such showing has been made here.

Even assuming that such a showing would have been made, the scope of discovery in the context of federal

criminal proceedings is much narrower than the liberality permitted for discovery in civil cases in the federal courts. The ability of a defendant in a federal criminal case to obtain materials from third parties is governed by Federal Rules of Criminal Procedure 16 and 17(c). Under neither of these rules is there authority for a defendant to obtain materials for pre-trial discovery purposes in the manner that has been done in the present case. The rules provide exclusive means for discovery in federal criminal cases. Since there is no authority in the applicable statutes or rules for this type of procedure the district court lacked jurisdiction to enter its order requiring that the files be produced for the inspection of the claimant. For these reasons, it is submitted that the district court's order should be reversed.

ARGUMENT

I. The District Court's Order of March 29, 1966 Is an Appealable Order.

Since the order appealed from is not the final judgment in the main criminal case that underlies the present appeal, the question arises as to whether the order of the court directing appellants to produce their files is an appealable order. This order was a final order within the meaning of 28 U.S.C. Sec. 1291; see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 Sup. Ct. 1221, 93 L.Ed. 1528 (1949), holding that under the "collateral order" doctrine, an order denying defendant corporation's motion to require plaintiff and intervenor to give security for expenses was an appealable final decision within the meaning of 28 U.S.C. Sec. 1291, since:

"The decision appears to fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of

the cause itself to require that appellate consideration be deferred until the entire case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. . . .

“We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.” 337 U.S. at 546-47.

The Court further stated that the order “does not make any steps toward final disposition of the merits of the case that will not be merged in the final judgment.” 337 U.S. at 546. The only relationship of appellants to the main criminal action is the demand made upon them for the production of certain files. Appellants are not parties to the main criminal action for any other purpose. The order that has directed them to turn over their files is a final order as to them, since no further proceedings are to be taken with respect to them.

This rationale has been applied in the discovery context in the case of *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955). In that case, an action by a bank against a surety to recover for the breach of an employee's indemnifying bond, the surety moved to have the bank produce reports of an examination made by national bank examiners. The acting Secretary of the Treasury asserted a claim of privilege, and the District Court denied its claim. The Court of Appeals held the order appealable, because the employment privilege would be irretrievably breached and beyond protection if an appellate court were not able to review the District Court's order before determination of the main action. See also *Tomlinson v. Florida Iron & Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961), where the court held an order denying a motion to disqualify

an attorney appealable, applying the *Cohen* rule, since there was a final decision in an ancillary matter.

For other discussion of the applicability of the collateral order doctrine in the discovery context, see 4 *Moore, Federal Practice*, ¶ 26.37 [1.-2], at 1719; ¶ 54.14; *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 999-1000 (1961).^{*} The district court's order of March 29, 1966 is a collateral order and thus final.

II. It Was Improper for the District Court to Conduct Summary Proceedings to Require That Appellants Turn Over the Files That Are Sought.

A review of the Statement of Facts clearly demonstrates that the proceedings before the district court were summary in character. The only hearings that were held were on the orders to show cause and the arguments following the granting of the order to produce the files. At no time was any evidence presented by the claimant that would indicate a proper legal claim to the files. The proceedings were of the sort that have been generally used to discipline attorneys in their relationship with their clients. As noted above, very early in these proceedings the materials in the files that were the property of Mr. Moore were returned to him, and a receipt was given for those items by Mr. Shea. Accordingly, this case is not one in which a client is seeking to obtain property that is rightfully his. Further, no relationship of attorney and client existed between appellants and Mr. Moore at the time of the summary proceedings. It is therefore inappropriate to treat the matter as one in which

^{*}This latter symposium note states that no cases have been found explicitly refusing to apply the doctrine in the discovery context, and that "the judicially created collateral orders doctrine would seem the most hopeful present possibility for securing interlocutory review in the federal courts of orders compelling discovery." 74 Harv. L. Rev. at 999, 1000.

the court is supervising a present, continuing attorney-client relationship. It has been held that a court has no summary jurisdiction over an attorney to compel him by order or rule of court to pay over moneys where the relationship of attorney and client did not exist. See *Brown v. Superior Court*, 78 Ariz. 120, 276 P.2d 540 (1954). Such a rule should equally be applicable to a demand for production of an attorney's files and work product, since these are also his property.

Since the case is not one in which the former client is seeking the return of his own papers or of money belonging to him, there is considerable doubt as to the propriety of his claim. The affidavit of Charles Crehore, (T. 43-44) indicates in detail the types of materials that are contained in the files. Because of the nature and the variety of these materials, there is at the very least a question of fact as to the propriety of the claim. In such case, the plaintiff client is required to have recourse to his other remedies, that is, to bring an action at law. In *Application of Longhorne*, 105 N.Y.S. 2d 788 (Sup. Ct. 1951), the court held:

"In all cases the client has relief in the ordinary tribunals for the determination of legal controversies, and, where his right to have a summary order can be reasonably questioned, he must be referred to the ordinary remedies. . . . One does not forfeit any of his rights by becoming an attorney at law. He has the same rights thereafter that other persons have, which includes the right to have asserted claims against him established in the regular and ordinary way, that is by action." 105 N.Y.S. at 789

An example of the caution with which courts approach the use of summary proceedings is reflected in *In re Long*, 287 N.Y. 449, 40 N.E.2d 247 (1942), where the court reversed summary proceedings in which a client sought to

obtain payment of moneys allegedly owing by his attorney. The court stated that summary proceedings

“should always be exercised with great prudence and caution in a sedulous regard for the rights of the client on the one hand, and of the attorney on the other. It is not an absolute right that the client has, to invoke this severe and summary remedy against the attorney, but one always subject to discretion.” 40 N.E.2d at 249.

And in *Gluckman v. Indig*, 161 Misc. 726, 292 N.Y.S. 791, affirmed, *In re Gluckman*, 250 App. Div. 989, 196 N.Y.S. 989 (1937), the court denied an application for summary proceedings, stating that such proceedings should be used cautiously because the order is a final determination of the attorney's rights. It held: “An officer of the courts should not be subjected to a summary proceeding unless it plainly appears that he is guilty of a breach of professional conduct or has acted in bad faith.” 292 N.Y.S. at 793.

The file in this case shows that at no time has it been contended by the claimant that appellants have been guilty of a breach of professional conduct or have acted in bad faith in such a manner as to make it appropriate to proceed against them by way of summary proceedings. No attempt has been made to bring the files before the court in the manner contemplated by Federal Rule of Criminal Procedure 17(c), even assuming that this rule were to be applicable in the present context.

III. Even Assuming That Under Some Circumstances Claimant Would Be Entitled to the Production of the Files, No Appropriate Showing of Need Has Been Made Here.

The questions presented by this case, the availability to a former client of his attorneys' work product, are directly analogous to the questions involved in the context of dis-

covery by an adverse party of his opponent's attorneys' work product. The leading case as to the discovery of materials in the possession of an opponent's attorney is *Hickman v. Taylor*, 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451 (1947). The Court there held that plaintiff was not entitled to discover from adverse counsel reports relating to oral statements obtained from witnesses by the attorney, because full answers to interrogatories and other sources of information were available to him. Even though these work product materials were not privileged as being within the scope of the attorney-client or professional privilege, it was held that the attempt to secure written statements, private memoranda and personal reflections prepared or formed by an adverse party's counsel in the course of his legal duties

"falls outside the area of discovery and contravenes the public policy underlying the execution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 510.

The considerations governing the Court in the above portion of the opinion apply equally to the demands made by a former client for the attorney's work product. Of continuing concern to an attorney in the course of his representation of a client is the possibility that the client will be unwilling to pay for the benefits of the services that he has received. If, upon termination of representation for failure to pay the fees and advances that are owing, the client were able to take advantage of the attorney's efforts on his behalf during the period of their representation,

there would be much greater difficulty in securing payment of legal fees and increased litigation over the custody of the attorney's work product files. Inevitably, to frustrate such demands and to make it more difficult for delinquent clients to obtain benefits of his labor, an attorney would be inclined to limit the placing in his files of his efforts, realizing that these might ultimately be obtained by the client without proper compensation. This concern is directly analogous to the following quotation from the *Hickman* opinion:

"Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." 329 U.S. at 511.

The *Hickman* case requires that before the work product of an attorney may be discovered, a sufficient showing of the necessity for the production of the material and a demonstration that the denial of production would cause hardship or injustice, or unduly prejudice the preparation of the client's case. 329 U.S. at 509. No such showing has been made here. Accordingly, it is submitted that under the Federal Rules of Criminal Procedure, as under the Federal Rules of Civil Procedure, such a demand is improper until a proper showing has been made.

The principle of *Hickman v. Taylor* has been applied to the demand of a former client in *Marco v. Sachs*, 109 N.Y.S. 2d 224 (Sup. Ct. 1951). There it was held that a paper drawn for the professional guidance and convenience of one of the former attorneys of a corporation with respect to a trans-

action in which he had represented it was not subject to discovery. Although the demand was brought by a plaintiff shareholder for production, the corporation that the attorney formerly represented also joined in the request. The court denied discovery, stating:

“As a private paper of the attorney, it constitutes part of his work product and his personal property and is not subject to the demand or control of the client or former client, Blue Ridge Corporation.” 109 N.Y.S.2d at 225.

A discussion of this suggested analogy has also been made in Novick, *Some Reflections on the Termination of the Attorney Client Relationship*, 44 Mass. L.Q. 41 (Oct. 1959). Novick concludes that the attorney's work product should be protected from a former client, both under the *Hickman* rationale, and because such papers are in the nature of trade secrets that are protected from discovery under Federal Rule of Civil Procedure 30(b).

IV. The Scope of Discovery Permitted by the Federal Rules of Criminal Procedure Does Not Extend to the Present Demand.

It is to be emphasized that the present case is a criminal action, not a civil case. The Federal Rules of Criminal Procedure, under which Mr. Moore and his counsel must proceed, contain no provision for the discovery of materials from third persons for pre-trial preparation, such as are contained in the civil rules. Federal Rule of Criminal Procedure 16 permits the court upon motion of a defendant only to order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the item sought

may be material to the preparation of his defense and that the request is reasonable. But this rule contains no provision for discovery from third persons prior to trial. Although Federal Rule of Criminal Procedure 17(c) permits the use of a subpoena to compel persons to whom it is directed to produce designated books, papers, documents or other objects, this procedure was not attempted in the present case.

It has been held that the only rights of pre-trial discovery given to a defendant in a criminal case are those in Rules 16 and 17(c). See *United States v. Palermo*, 21 F.R.D. 11 (S.D.N.Y. 1957). And, in general, the Federal Rules have been held to provide exclusive remedies. The contention has been rejected that a district court possess inherent powers in addition to those set forth in the Rules. See *Societe Internationale, etc. v. Rogers*, 357 U.S. 197, 78 Sup. Ct. 1087, 2 L.Ed. 2d 1255 (1958). The use of a subpoena duces tecum procedure is not intended to provide additional means of discovery, but only to expedite trial by providing a time and place before trial for the inspection of subpoenaed materials. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 71 Sup. Ct. 675, 95 L.Ed. 879 (1951). The subpoena procedure is designed only to establish liberal policy for the production, inspection and use of materials at the trial. *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962), *cert. denied*, 373 U.S. 902, 83 Sup. Ct. 1289, 10 L.Ed. 2d 198 (1963).

It has been repeatedly held that the purpose of the subpoena procedure is not a pre-trial discovery procedure but is designed as an aid in obtaining evidence which defendant can use at trial when good cause has been shown. See *United States v. Smith*, 209 F.Supp. 907 (E.D. Ill. 1962); *United States v. Ferguson*, 37 F.R.D. 6 (D.D.C. 1965); *United States v. Hanlin*, 29 F.R.D. 481, (W.D. Mo. 1962);

United States v. Abrams, 29 F.R.D. 178 (S.D.N.Y. 1961);
United States v. Van Allen, 28 F.R.D. 329 (S.D.N.Y. 1961).

It is thus apparent that even had some sort of showing of need been made by claimant to the files in question, the Federal Rules of Criminal Procedure specify a scope of discovery much narrower than that permitted by the civil rules. Accordingly, it is submitted that the Rules of Criminal Procedure are the exclusive means of procedure in the conduct of Federal criminal cases, that their scope does not permit claimant to demand the files in question as pre-trial discovery from a third party, and that the district court lacked jurisdiction to enter such an order.

CONCLUSION

The proceedings in the district court have been unusual and irregular, to say the least. In those proceedings a former client's present attorney has attempted in a summary manner to obtain from appellants materials that appellants prepared or were prepared under their direction or in response to communications by them. There has been no showing that the papers in question ever belonged to the client, and there has been bad faith in withholding them, or that there has been any unprofessional conduct involved. These papers have no inherent value to the client, except as they may be used in the preparation of his defense. If they were so used, there would be no point in having them thereafter returned to appellants—they would have served their purpose. There has been no showing in the record that these materials are any way unique or that they are incapable of being independently prepared. Such a showing should be required before production is ordered. And, in any event, under the decisions construing Federal Rules of Criminal Procedure 16 and 17(c), pre-trial discovery of

third persons is inappropriate in a criminal case in the manner attempted here, and the district court lacked jurisdiction to enter such an order.

For the foregoing reasons, therefore, it is respectfully submitted that the district court's order directing production of the materials sought by Mr. Moore and his present counsel be reversed.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP
and HAROLD R. SCOVILLE

By JOHN P. FRANK
PAUL G. ULRICH

Attorneys for Appellants

July, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL G. ULRICH

FILED

AUG 22 1966

WM. B. LUCK, CLERK

NOV 1 1966

TABLE OF CONTENTS

	Pages
Jurisdiction.....	1
Statement of the Case.....	2
Argument.....	4
I. The District Court's Order of March 21, 1966, is not an Appealable Order.....	4
II. The Appellants, Having Participated Without Objection in the Proceedings Below, Cannot Later Be Heard to Complain that They Were Unfair. In Any Event, the Proceedings Were Appropriate and Reasonably Suited to the Business at Hand.....	8
III. The Order Appealed From Does Not Violate the Rule of Hickman v. Taylor.....	13
IV. The Objection to an Alleged Violation of the Federal Rules of Criminal Procedure is Not Timely. Those Rules Did Not Apply to This Proceeding. If They Did Apply There Was Not a Material Violation.....	14
Conclusion.....	15

TABLE OF AUTHORITIES

Cases

	Pages
Acheson v. Nobuo Ishimoru, 185 F.2d 547 (9th Cir.1950).....	6
Alexander v. U.S., 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906).....	5
Cobbledick v. U.S., 309 U.S. 323, 60 S. Ct. 540, 84 L.Ed. 783 (1940).....	5,6
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949).....	7
Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947).....	4,13,16
Maggio v. Zeitz, 333 U.S. 56, 68 S. Ct. 401, 92 L.Ed. 476 (1948).....	11
Maloney v. Brandt, 123 F.2d 779 (7th Cir. 1939).....	9
McComb v. Goldblatt Bros., 166 F.2d 387 (7th Cir. 1948).....	9

STATUTES AND RULES

	Pages
Rule 26, Federal Rules of Civil Procedure.....	13
Rule 17, Federal Rules of Criminal Procedure...	15

OTHER

6 Moore's Federal Practice, 54.14.....	7
--	---

NO. 21030

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MERLE W. MOORE,

Defendant.

Appeal of Lewis Roca Scoville Beauchamp
& Linton and Harold R. Scoville, as
collateral parties.

BRIEF OF APPELLEE

JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of Arizona on March 29, 1966 (T. 45), in the case of United States of America vs. Merle W. Moore, No. C-16857 Phx., and from the order denying the motion for rehearing, entered on April 18, 1966. There is no statute or other rule of law authorizing this appeal.

STATEMENT OF THE CASE

The appellee has been under indictment on three counts of tax evasion since February 18, 1964. (Tr.1-3,60) The appellants undertook to represent him in his tax troubles on or about January 30, 1961, and terminated the attorney-client relationship in September, 1963, because appellee was unable to pay the fee. (Tr.22) He has since been unable to pay any fees whatever. (Tr.7) Because its fee is unpaid, appellants refuse to grant appellee's present lawyer access to the case file. (Tr.40) The present lawyer has contended that without this file (which consists of correspondence with the Government and a transcribed copy of a statement given to the Government) he cannot adequately prepare for trial. (Tr.8,14,43)

The resulting controversy was brought before the District Court in Phoenix and has been orally argued there on three occasions. (Tr.61) The proceeding was initiated by the filing of a petition on February 4, 1966 and the issuance of an order on that date requiring appellants to show cause why they should not turn appellee's files over to his present lawyer. (Tr.13-15) At the hearing on this order the Court told counsel to work it out between themselves. (Tr. 61) A similar petition was presented on March 14, 1966, and a second order to show cause issued to appellants on that

date. (Tr. 16-19) On March 18, 1966, appellants filed a written response to this order which was directed to the merits of the controversy. (Tr. 20-21) No objection was made to the nature of the proceeding. On March 21, 1966, after oral argument, the Court ordered the former lawyers to give the present lawyer access to the file. (Tr.42 and 45)

Having lost this round, appellants on April 1, 1966 moved for a rehearing. (Tr. 22) In this motion, appellants, for the first time, objected to the nature of the proceeding, labeling it "summary" and, therefore, inappropriate. The motion for rehearing was denied on April 11, and again on April 18, 1966. (Tr. 62)

The appellee has been trying since at least January 18, 1966, to gain access to his file so that he will be prepared for trial. (Tr. 61) This has caused substantial delay in bringing this cause to trial. The trial set for February 1, 1966 had to be postponed to September 27, 1966. Another motion for continuance must be filed because of the delay occasioned by the appeal of a collateral party.

The issues that have arisen from this are:

1. Whether the order of the District Court requiring the former lawyers to give access to files to the present lawyer is appealable;

2. (a) Whether the District Court's order is reversible because of the summary nature of its proceedings; and

(b) Whether, in any event, appellants are not now estopped from objecting to the form of the proceedings;

3. Whether the order appealed from is invalid under the rule of Hickman v. Taylor; and

4. Whether the District Court was without jurisdiction because the procedure violated the Federal Rules of Criminal Procedure.

ARGUMENT

I. The District Court's Order of March 29, 1966 is Not An Appealable Order.

Absent specific statutory authority, federal courts have been most reluctant to permit piecemeal appeals of proceedings in the district courts. The policy underlying this reluctance is most strong in criminal cases where there is a particular urgency to get on with the cause without interruption after a man has been subjected to the stigma of a felony indictment. It is indeed Supreme Court law that the interest of a third party in protecting the privacy of his documents and papers must give way to the higher interest of the Courts and of parties to a criminal case to proceed promptly with the underlying action. And so it is held that there is no interlocutory appeal from the denial of a motion to quash a subpoena duces tecum calling for the production

of the appellant's papers. Cobbledick v. U.S. 309 U.S. 323, 60 S.Ct. 540, 84 L Ed. 783 (1940); Alexander v. U.S. 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906).

The opinion in the Cobbledick case (which affirmed a decision of this Court) is a learned discussion of this subject by the late Justice Frankfurter. It points out that the fact that the interest of appellant may be separable from and collateral to the underlying action does not of itself give rise to a right of appeal. Indeed, the right to appeal even after final judgment "is a matter of grace and not a necessary ingredient of justice**" 84 L.Ed. 783, 785. Furthermore, it holds that "the requirement of finality will be enforced not only against a party to the litigation, but against a witness who is a stranger to the main proceeding."

The case of Alexander v. U.S. (supra) is not materially distinguishable from Cobbledick. It holds that in a case such as the one before us, where a recalcitrant third party is ordered to turn over papers which are necessary for the proper conduct of a trial,

his right to appeal does not arise until after he has disobeyed the order and has been adjudged in contempt. Until then, the proceeding as to him is merely interlocutory. Mr. Justice McKenna put it this way:

"In a certain sense, finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a Court. And, such an order may coerce a witness leaving him no alternative to obey or be punished. Let the Court go further and punish the witness for contempt of its order -- then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case.*** This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that, the proceedings are interlocutory in the original suit." 50 L ed. 686, 686.

This Court has applied the Cobbledick rule even in a civil case where it appeared that recognition of the right to an interlocutory appeal would unduly hamper the progress of the action at the district court level. Acheson v. Nobuo Ishimaru, 185 F 2nd. 547 (9th Cir. 1950) This was a declaratory judgment action against the Secretary of State in which the plaintiff, Ishimaru, sought a judgment declaring that he was a national of the United States. He was, however, unable to attend his

trial, which was pending in Hawaii, unless the Secretary of State issued him a Certificate of Identity. The District Court ordered that such a Certificate be issued to the plaintiff and from this order the Secretary of State appealed. This Court held that the order was not appealable since it did not fall in that small class of orders referred to in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L ed. 1528 (1949). See also 6 Moore's Federal Practice, 54.14.

It appears from the foregoing that the applicable rule is that at least in a criminal case an interlocutory right of an appeal will not be recognized in favor of either a party or a stranger to the action who has been ordered to turn over unprivileged papers in his possession which the trial Court deems necessary for the proper conduct of the litigation. The rule has special applicability in a case such as this where the papers being sought are essential to the proper defense of a person charged with a serious crime. Certainly, he should be entitled to get on with his case without being subjected to time consuming and expensive appeals by his creditors.

II. The Appellants, Having Participated Without
Objection in the Proceedings Below, Cannot
Later Be Heard to Complain That They Were
Unfair. In Any Event the Proceedings Were
Appropriate and Reasonably Suited to the
Business at Hand.

On March 14, 1966, the District Court in Phoenix, Arizona, on the petition of the appellee, issued an order directed to the appellants requiring them to appear before the Court on March 21, 1966 and show cause, if any, why they should not be required to provide access to all files and papers relating to this case to the appellee or his attorney. On March 17, 1966, appellants filed their Response to Order to Show Cause. Appellants maintained in this Response that the papers in their Merle Moore file were their work product and Moore could not see them until he paid his fee. There is not even a suggestion in this Response that appellants in any way objected to the Court's jurisdiction over their persons; nor did the appellants in this Response in any way make an objection to the Court's jurisdiction of the subject matter; and there is no inkling that the appellants in any way objected to the procedures being followed in

the District Court to resolve this legal file controversy. It was only after appellants engaged in the battle and lost that they apparently came to the conclusion that the ground rules were not fair. This belated objection to the "summary" nature of the proceeding, being untimely, should not be considered.

The case is indistinguishable from that of McComb v. Goldblatt Bros., 166 F. 2nd 387 (7th Cir. 1948). In this case the plaintiff, who was the Administrator of the Wage and Hour Division of the Department of Labor, sought an injunction against the defendant under the Fair Labor Standards Act, contending that the defendant was violating the minimum wage law. Upon the defendant's suggestion, the plaintiff acquiesced to a procedure whereby the principal issue of fact would be tried on affidavits. This procedure was followed and the ruling went against the plaintiff, whereupon he claimed for the first time foul play. The procedure was upheld. See also Maloney v. Brandt, 123 F. 2nd 779 (7th Cir. 1939); National Labor Relations Board v. Townsend, 185 F. 2nd 378 (9th Cir. 1950).

Furthermore, when we explore the alternative

advocated by the appellants, we find it leads to a completely absurd result. The alternative would be that the appellee, the defendant in the criminal case below, would be required to bring an action in replevin in the state court in order to get the file to which he feels he is entitled and which he feels is absolutely essential to his defense. He would be required to plead that he is the owner of the file, that he is lawfully entitled to its possession, and that it is wrongfully being retained by the defendants. Upon the filing of a bond the sherrif would be ordered to seize the property, but before he actually got his hands on it the defendants would similarly file a bond and thereby would be entitled to the possession of the file for the duration of the action. The defendants would naturally demand trial by jury to which they would be entitled, thus postponing the determination of the controversy for a very substantial period of time. Meanwhile, the United States Attorney would be insisting that the criminal action in the District Court be prosecuted and the Federal District Court Judge would be in the position of pleading with the parties to hurry it along so that he could get on with his criminal

calendar. Years later, the defendant, armed with his file (if the state court jury saw fit to give it to him), would return to the Federal District Court and announce that he was ready to proceed. All this is not facetious argument. The hard fact is that if the criminal defendant were required to pursue his remedy in a plenary proceeding, he would have to go to the state court and rely on it to make the determination necessary to assure him of a fair trial in the Federal District Court. The absurdity is propounded when we consider that there isn't even an issue of fact involved in this controversy.

Finally, in the consideration of this summary-plenary proceeding issue, it may be profitable to look at the experience of the bankruptcy courts. Referees in bankruptcy are faced almost daily with the question of whether they can order summarily that assets in the hands of third parties be turned over to the trustee in bankruptcy, or whether the trustee in bankruptcy should be required to bring an independent and so-called plenary action to acquire the assets. The dividing line between what may be done summarily and what must be prosecuted in a plenary fashion was rather clearly delineated in Maggio v. Zeitz, 333 U.S. 56, 68

S.Ct. 401, 92 L ed. 476 (1948). The Supreme Court in this case likened the bankruptcy court's summary turnover proceeding to the common law actions of replevin and detinue. These actions provided specific relief for the wrongful detention of chattels, as distinguished from trespass or trover which were actions for damages. The Court's opinion went on:

***the primary condition of [summary] relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so." 333 U.S. 56, 63, 92 L ed. 476, 484.

The Court went on to reason that if the bankruptcy court seeks damages for wrongful conduct or seeks to recover money which has been embezzled, then the plenary action must be pursued. The point is that if the court merely wishes to acquire papers having no inherent value, it may issue a turnover order for them in a summary proceeding. If on the other hand, it seeks money, which is only arguably owing by the person proceeded against, then that person is entitled to a full scale trial of the issues of fact. By the analogy then to the bankruptcy courts experience in summary and plenary proceedings, we again come to the inescapable conclusion that summary proceedings such as were conducted below were appropriate to the prosecution of the business at hand.

III. The Order Appealed from Does Not Violate
the Rule of Hickman v. Taylor.

The appellants contend that the order of the District Court should be reversed because it violates the rule of Hickman v. Taylor, 329, U.S. 495, 67 S.Ct. 385, 91 L Ed. 451, (1947). A simple and brief comparison between the holding in the Hickman case and the facts of this case should be sufficient to dispose of this argument.

Hickman v. Taylor holds that a party in a civil case is not entitled under Rule 26, Federal Rules of Civil Procedure, to secure from the attorney of an adverse party the production of witnesses' written statements and the attorney's mental impression as to their oral statements, without a showing of necessity. But the case of U.S. vs. Moore is not a civil case; the criminal defendant below did not proceed under Civil Rule 26; and the criminal defendant below did not seek witnesses' statements from the attorney for an adverse party. Finally, the criminal defendant below did make a showing of necessity for the papers that the Court ordered the appellants to turn over to appellee.

IV. The Objection to An Alleged Violation of the Federal Rules of Criminal Procedure is Not Timely. Those Rules Did Not Apply To This Proceeding. If They Did Apply There Was Not A Material Violation.

After the appellants participated in the proceeding below and failed to prevail they raised for the first time their objections to the procedures that had been followed. They lately complain that it was a "summary" proceeding and there should have been a full scale trial. In the same vein, they lately complain that the procedural niceties of the Federal Rules of Criminal Procedure were not adhered to. For the reasons discussed under II above this objection should be dismissed.

In any event the proceeding below is not of the sort which is governed by the Criminal Rules. The proceeding was simply a hearing by a judge to settle a squabble between a litigant in his court and certain officers of the court who were formerly his lawyers. The power to settle this sort of squabble is inherent in the judge's office. The only procedural requirements are those of notice and hearing. In this case the Judge was completely fair and eminently courteous to those before him. He followed all rules of fundamental fairness.

Even if the Criminal Rules were held to apply to this case there would still be no grounds for appeal because those Rules were not materially breached. Rule 17 (c) provides that the Clerk may issue a subpoena directing a person to produce papers for inspection before a trial. If appellee had followed this procedure appellants would have moved to quash the subpoena. There would then have been a hearing (just like the one that was held) and that would be followed by an order (just like the one that was issued). Since under either procedure the result is the same there can be no claim of harm. Accordingly this cannot be the basis of an interlocutory appeal.

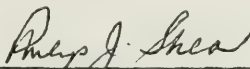
CONCLUSION

The recognition by this Court of a right to appeal Judge Craig's order would be inconsistent with the rulings of the Supreme Court. It would furthermore encourage interlocutory appeals by persons who for various reasons do not want unprivileged papers to be subjected to scrutiny by parties in litigation.

The proceedings below were eminently fair. The controversy was orally argued three times. Only after the order was issued did anyone suggest that there should have been a full scale trial and that the Federal Rules of Criminal Procedure~~s~~ should have been strictly adhered to. These procedural objections, in addition to being tardy, are absurd. The argument that the rule of Hickman v. Taylor is applicable in this case is specious. It deals with something else altogether.

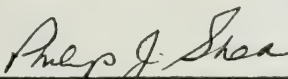
Permitting Merle Moore access to his file in accordance with the order of March 21, 1966 is legally proper. But more than that, it is the fair thing to do.

Respectfully submitted,



Philip J. Shea
Lawyer for Merle Moore, Appellee
August 19, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, this brief is in full compliance with those rules.



Philip J. Shea

No. 21130 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP
BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and
Order of National Labor Relations Board.

REPLY BRIEF FOR PETITIONER.

HILL, FARRER & BURRILL,

M. B. JACKSON,

KYLE D. BROWN,

411 West Fifth Street,
Los Angeles, Calif. 90013,

Attorneys for Petitioner.

FILED

JUN 12 1967

WM. B. LUCK, CLERK

JUN 13 1967

JUN 13 1967

TOPICAL INDEX

Page

I.

The Respondent's Brief, Characteristically, is Grounded Upon Isolated Bits and Pieces of the Evidence, Totally Ignores Unfavorable or Explanatory Testimony and, as a Result, Has Distorted the Record and Misrepresented the True Facts of This Case	1
Introduction	1
A. The Board's Contention That the Parties Failed to Reach Agreement on a Contract Can Be Supported Only by Disregarding All of the Relevant Testimony on That Score	3
B. The Argument That Petitioner's Motive in Locking Out Its Employees Was to Keep the Union "Subservient" to It Finds No Support in the Evidence and, Even if True, Cannot Be the Basis of an Unfair Labor Practice Finding	6
C. The Events of April 24, Including the Tonkins' Conversation With Hill and the Employees' Vote to Continue the Unfair Labor Practice Charge Provide Support for the Company's Position Herein	10
D. The Contention That Petitioner Interfered With the Independent by Forwarding a Copy of the Contract to the Board Under Its Name Is Not Supported by Substantial Evidence	11

	Page
E. The Point Which Petitioner Makes Concerning the Applicable Standards of Review Was Not at Issue in the Walton Case and Has Not Been Disapproved by That or Any Other Decision	12
II.	
The Board Has Not and Cannot, Realistically, Distinguish the Case at Bar From American Ship Despite Its Tortuous Attempts to Do So	14
III.	
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases	Page
American Ship Building Co. v. NLRB, 380 U.S. 300	18
Deluxe Metal Furniture Co., 121 NLRB 995	15
NLRB v. Cleveland Trust Co., 214 F. 2d 95	13
NLRB v. Cowell Portland Cement Co. (9th Cir. 1945)	14
NLRB v. Florida Citrus, 388 F. 2d 630	12
NLRB v. I. Posner, Inc., 342 F. 2d 826	10
NLRB v. Kellogg's Inc., 347 F. 2d 219	18
NLRB v. National Motor Bearing Co., 105 F. 2d 652	14, 16
United Packinghouse Workers of America v. NLRB, 210 F. 2d 325	13
NLRB v. Security Plating Co., 356 F. 2d 725	16
NLRB v. Servette, Inc., 377 U.S. 46	5
NLRB v. Walton, 286 F. 2d 16	12
NLRB v. Walton Mfg. Co., 369 U.S. 404	12
NLRB v. United Brass Works, 287 F. 2d 689	13
S. H. Kress & Co. v. NLRB, 317 F. 2d 225	10
Shattuck Denn Mining Corp. v. NLRB, 362 F. 2d 466	16
Snow v. NLRB, 308 F. 2d 687	18
Universal Camera Corp. v. Labor Board, 340 U.S. 474	13

Statutes

National Labor Relations Act, Sec. 8(a)	8
National Labor Relations Act, Sec. 8(a)(2)	8
National Labor Relations Act, Sec. 8(a)(3)	12, 16
National Labor Relations Act, Sec. 8(a)(5)	11, 18
National Labor Relations Act, Sec. 8(d)	5

No. 21130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP
BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and
Order of National Labor Relations Board.

REPLY BRIEF FOR PETITIONER.

I.

The Respondent's Brief, Characteristically, Is Grounded Upon Isolated Bits and Pieces of the Evidence, Totally Ignores Unfavorable or Explanatory Testimony and, as a Result, Has Distorted the Record and Misrepresented the True Facts of This Case.

Introduction.

It is well worth note that the Trial Examiner's initial unfair labor practice finding in the instant case, as well as the Respondent's Decision and Order adopting that finding, occurred *prior* to the decision of the United

States Supreme Court in *American Ship Building Co. v. NLRB*, 380 U.S. 300. Because of this circumstance, the Board has placed its General Counsel in the unenviable position of justifying an "unfair labor practice" finding based on activities wholly legitimized by that decision.

In the development of a supporting rationale, *post facto*, for an insupportable decision the General Counsel has, of necessity, resorted to a hit and run review of the record, ignoring certain key facts and testimony while drawing misleading and erroneous assumptions from others. Moreover, like a man grasping at straws, the General Counsel has selected only favored portions of the evidence, no matter how minute, and acts which, in and of themselves, are perfectly legal, has mixed all these together, and attempted to stigmatize the result as illegal.

The Court can uphold the Board's decision only if its findings are supported by "substantial evidence" and the conclusions drawn therefrom comport with the law. Petitioner submits that, upon close analysis, both the factual and legal bases for the Board's decision collapse like the house of cards upon which they are built. The Board should not be permitted to avoid its statutory obligations by nitpicking through the record and then taking refuge under the convenient haven of "expertise". We shall, in this brief, endeavor to point up those areas in which the inherent weakness of the Board's position has been exposed, and in so doing, demonstrate that its Decision is untenable.

As a preface to those following portions of the argument which deal with the so-called lock-out, Petitioner

cannot emphasize too strongly the point made in the Opening Brief that *there never in fact was a lock-out of the Petitioner's employees*, nor is there substantial evidence to support such a conclusion. We invite the Court's attention, in this connection, to the fact that the Board has continually sidestepped all of the evidence establishing that prior agreement had been reached the preceding Friday and that on 1 April a lock was *left* on the truck gate (not specially placed there) solely to facilitate the union meeting previously called. Consequently, we wish to make it quite clear at the outset that all references in this brief to the alleged lock-out are for the sake of argument only.

A. The Board's Contention That the Parties Failed to Reach Agreement on a Contract Can Be Supported Only by Disregarding All of the Relevant Testimony on That Score.

The Board attempts to support its finding that no agreement was reached on Friday evening, 29 March only by the bald assertion that,

“The representatives (of the Independent) did not agree to accept the Company's wage offer and, once it was discovered that “Pepsi” was deadlocked on wages, there was no agreement on wages at all.” (Resp. Br. pp. 14-15).

Thus conclusion totally ignores the abundant contrary evidence presented at the hearing. *All* of the testimony concerning this subject indicated that agreement was reached on the basis that Petitioner would institute an immediate \$3.00 wage raise and would, additionally, match any higher increase given by *any other beverage*

*company in the area.*¹ Agreement, therefore, did not hinge on the concurrent negotiations at Pepsi-Cola; indeed, although the wage rate at “Pepsi” was checked by the Tonkins in response to employee Bernal Williams’ suggestion [Tr. 82-83; Pet. Br. n. 13, p. 34], the fact that “Pepsi” was deadlocked on wages in no way affected the agreement reached at Seven-Up, which, in effect, amounted to a “most favored nation” clause. That is, if any other local bottler (and there were many more besides “Pepsi”) paid a higher wage, Petitioner would match it.

The Board’s protestations to the contrary are belied by its own admission that the Independent’s officers consistently used the word *ratification* in their discussion with management on Friday night.² Obviously the question of ratification would never have arisen unless *there was in fact a prior agreement to ratify!* Once the fact of agreement is established, it becomes apparent that the locked truck gate on 1 April did not constitute a lock-out, in the traditional sense, at all. Believing that agreement had already been reached, the Company merely took steps to insure attendance at the meeting which the

¹Thus, for example, employee Jensen testified as follows: “Q. Was the point that Mr. Huleva mentioned regarding the Company’s matching any other increase by Pepsi *or anybody else in the local bottling industry* a part of that general understanding? A. Yes, uh-huh.” [Tr. 340-341]. (Emphasis added). This understanding was fully corroborated by employees Huleva, Fletcher, Olsen, Hill and Williams (See Pet. Br. n. 13, pp. 31-34).

²The brief of the Board states, “Moreover, the company does not dispute that the union representatives told the Tonkins that no agreement could be made *without a ratification vote* by the membership”, and “. . . they had informed the Tonkins *that a ratification vote would be necessary.*” (Resp. Br. p. 15). (Emphasis added).

Union officers themselves called, and which the Company took to be a mere formality prior to execution.³

The Board further errs in its statement of the Employer's claim regarding the purpose for the lock-out (assuming, now, that one existed) when it states (Resp. Br. p. 16) that it was to force *ratification* of the contract already agreed upon. Petitioner vigorously disputes this. Firstly, ratification is purely an internal union matter and secondly, the Company was far from certain that the same was required.⁴

Petitioner's position, to make it perfectly clear, is that its aim was to secure *execution* of a contract it honestly believed to have been agreed to previously. Again, if *American Ship* permits a lock-out to pressure a union into accepting its proposals in the first instance, a lock-out to force a union to execute a contract already agreed to, as expressly permitted by Section 8(d) of the Act, presents an *a fortiori* case.

³In this connection, Petitioner, after a re-examination of the record, concedes its error, as pointed out by Respondent, that three employees, rather than *one*, gave testimony from which it could be inferred that Harry Tonkin's remarks on Friday implied a threat to lock-out on Monday if no agreement was reached [Tr. 107-108; 76; 160]. But even if this be true, such a statement was perfectly legitimate. Since an employer is lawfully entitled to lock-out its employees, it can certainly threaten to do so [Cf. *NLRB v. Servette, Inc.*, 377 U.S. 46 at page 57]. However, the remarks themselves became purely academic when agreement was reached later than same evening, for this achievement wiped out the basis for any threatened lock-out.

⁴The rank-and-file employees testified that the Negotiating Committee had been *authorized* to conclude an agreement if their terms were met, that those terms were not only met but bettered, and that they believed matters had been settled on Friday without the necessity of ratification [Tr. 337-338; 342-344; 347; 350-352]. There is absolutely no evidence that during the union's meeting on Friday it was required or even suggested that a later vote was necessary to ratify the contract.

B. The Argument That Petitioner's Motive in Locking Out Its Employees Was to Keep the Union "Subservient" to It Finds No Support in the Evidence and, Even if True, Cannot Be the Basis of an Unfair Labor Practice Finding.

Respondent makes a great deal of the fact that the Independent Union was somewhat casually run and the conduct of its affairs sporadic, at least when election of officers or contract negotiations were not impending. Among other things, Respondent avers that the Independent was a "weak, loosely organized group originally established to keep the Teamsters out of the plant", in its effort to show that the lock-out was for the purpose of keeping the union "subservient" to Petitioner (Resp. Br. pp. 11-13; 3).

The testimony that the Independent was formed "to keep the Teamsters out" came from James Elder, an *employee*, who was primarily responsible for the Independent's formation and acted as its President for some time [Tr. 422]. All it indicates, therefore, is the feeling of Petitioner's *employees* about the Teamsters several years earlier, and well prior to the time the Company was purchased by present management, a fact which is totally irrelevant to the charges against Petitioner in this case. Respondents failure to indicate the source of this testimony is typical of its general approach to the evidence in this case and can only be interpreted as a deliberate attempt to mislead this Court into believing that Petitioner assisted the formation of the Independent Union for anti-Teamster reasons. As we point out below, nothing could be further from the truth.

Moreover, the evidence indicates that the Independent Union was an effective representative of its member-

ship. This is no where better shown than by the fact that Petitioner made concessions in practically every area encompassed in the Independent's list of contract proposals. That list designated hours of employment, health and welfare, wages, sick leave, route seniority and retirement as subjects of negotiation [R. 1; Tr. 50]. The concessions included a two-step wage raise and a supplemental "most favored nation" agreement that any further increase in the local beverage industry's wage scale would be matched by Petitioner; the granting of time and one-half for overtime for plant employees; oral concessions on the issue of paid holidays and sick leave; agreement that the driver salesmen bonus system would be re-examined and reorganized on a more favorable basis⁵ (even though this was not formally requested by the union), and agreement by Petitioner to consider the establishment of an employee pension plan and to increase its contribution to the present health and welfare plan as soon as Petitioner was financially able.

Thus, out of six specific requests, three were accepted by the Petitioner: wages, over-time and sick leave. Two concessions, holidays and the bonus system, were added even though beyond the scope of the original demand. Two more, health and welfare and retirement, Petitioner promised to improve when financially able. On only one subject, that of route seniority, was the Independent unable to make headway. This evidence, all uncontradicted, certainly is diametrically

⁵This commitment was in fact fulfilled by the Company, as union President Hill's testimony discloses [Tr. 109; R. 14]. It therefore emphasizes the Company's good faith throughout the contract negotiations and underscores the true worth of its "oral concessions" which the Board seeks, so contemptuously, to disparage.

opposed to the Board's finding that the Independent was "malleable to (Petitioner's) will." (Resp. Br. p. 13).

Moreover, if the General Counsel and the Board mean to suggest, by use of the term "subservient", that the Independent was assisted, dominated or interfered with by Petitioner within the meaning of Section 8(a)(2) of the Act⁶ prior to the so-called lock-out of April 1, such an inference is flatly contradicted by the *Board's own finding*. The Trial Examiner (and the Board) expressly found that:

"There exists in this record then no evidence that before the events in late March or early April, the Respondent (Petitioner herein) did any thing which might be characterized as assistance to or domination of the Union within the Act's meaning. Although in late March, the Respondent was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus, it appears that the Respondent was wholly free, at least until then, to deal with the union and to reach whatever agreement with the union that it could." [R. 21-22]. (Emphasis added).

On the other hand, if the word "subservient" is meant simply to denote that the Independent was a "weak" union, as opposed to a "strong" one, the Board has raised a false issue. To the extent there was "weakness" in the Independent, and this is not con-

⁶The Act provides at Section 8(a): "It shall be an unfair labor practice for an employer— . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

ceded, it was a consequence of the conduct of the membership and was in no way attributable to Petitioner. The only question in law is whether a union is dominated, assisted or interfered with *by the employer*. The fact that a union may be “weak” in no way alters the obligations imposed by law on an employer to recognize and deal with it. Yet, despite this, the Board cites the Independent’s alleged ineffectiveness as evidence of the *Petitioner’s* culpability.

The unspoken premise here is that somehow the Petitioner must deal differently with a “weak” union than with a “strong” one. Evidently the employer must also, at its peril, be charged with deciding whether a union is weak or strong, a startling proposition to say the least.

However, under the law, the fact that a union is ineffective is of no moment unless it is the consequence of the employer’s conduct, and this was expressly negated by the decisions of the Trial Examiner and the Board below [R. 21-22].

At all times the Independent was an undominated, unassisted union representing a majority of Petitioner’s employees. Therefore, Petitioner was free to deal with it to the full extent allowed by law, including locking out its members to secure agreement to its contract proposals. The Board’s intimation that an employer may not lock-out a “weak” union (although presumably it could lock-out a “strong” one) is seen, upon analysis, to be made of whole cloth.

C. The Events of April 24, Including the Tonkins' Conversation With Hill and the Employees' Vote to Continue the Unfair Labor Practice Charge Provide Support for the Company's Position Herein.

Implicit in the Board's discussion of the April 24 meeting is the suggestion that by conversing with Howard Hill, the Independent's President, concerning the pending unfair labor practice charge, the Company engaged in improper behavior. Yet while this meeting was mentioned in the Trial Examiner's decision [R. 20], he attached no significance to it, and the meeting was not found by the Trial Examiner or the Board to have violated the Act in any way. The incident does not even appear in the Board's Supplemental Decision, from which this appeal is taken [R. 81-86].

According to Hill, this conversation arose spontaneously, not upon the edict of the Company and its entire tone and context was both casual and congenial. He made it plain that he believed it to be a sincere and genuinely motivated gesture on the part of both sides to ascertain what, if anything, was wrong and to explore reasonable means of setting it right [Tr. 91-97]. Hill's testimony makes it clear that he did not feel threatened or coerced and that he had no apprehensions in this respect. There was, therefore, nothing unlawful about the conversation. *S. H. Kress & Co. v. NLRB*, 317 F. 2d 225 (9th Cir. 1963); *NLRB v. I. Posner, Inc.*, 342 F. 2d 826 (2nd Cir. 1965) and cases there cited. Indeed, it would be an alarming principle were the Court to find, as the Board urges, something unlawful in a Company's discussion with the *President* of its employee's representative about the resolution of their differences.

As a further point, the Board contends that the vote of the membership, also taken on that day, to continue

pressing the unfair labor practice charge, was a vote of confidence for the Independent's officers and indicated that they had the cooperation and support of the rank-and-file (Resp. Br. p. 17). But at the time of this vote, April 24, the unfair labor practice charge on file alleged a violation of Section 8(a)(5) (refusal to bargain). Thus, a vote to continue the charge was a vote to force the Petitioner to bargain collectively with the *Independent*, not the Teamsters, as the recognized representative of the Company's employees. It therefore lends support to Petitioner's contention that the efforts of the officers to abandon the Independent in favor of the Teamsters Union did not reflect the wishes of the general membership, besides being in direct conflict with the fiduciary obligations imposed on the officers vis-a-vis the Independent by Federal Law.

Furthermore, the fact that the officers, despite their own desires, executed the collective bargaining agreement on Monday, April 1, can only be explained as an acquiescence by the officers in the mandate of the membership.

D. The Contention That Petitioner Interfered With the Independent by Forwarding a Copy of the Contract to the Board Under Its Name Is Not Supported by Substantial Evidence.

Consistent with its tendency to emphasize the picayune, the Board persists in citing the Company's transmittal of a copy of the contract in the Independent's name as evidence of its efforts to "forestall" Teamster's organization (Resp. Br. p. 12; 6-7). But the Trial Examiner *accepted* Millard Tonkin's testimony that he forwarded copies of the agreement to the Board's Regional Director, pursuant to the latter's formal re-

quest, over the printed signature of the union, “upon the understanding . . . that the union officials were agreeable to such a course, or perhaps even desirous of it. . . .” [R. 18].

Therefore, the Board’s conclusion rests untenably on the undisclosed intent of the union’s officers, rather than on Petitioner’s motivation. President Hill had told Millard Tonkin that as far as he was concerned, Tonkin could send the contract in or not as he desired and that it was up to his discretion [Tr. 111; 39; 318]. The evidence supports only the view that Tonkin believed the Independent wished to communicate to the Board its interest in the matter and that he was accommodating it in complying with the Regional Director’s request.

In this connection we note again there is no evidence that the union’s rank-and-file was contacted by the officers or that *their* position on the matter of submission of the contract was solicited. On the contrary, Hill and Barwise acted on the advice of a *Teamster* representative [Tr. 38-39].

E. The Point Which Petitioner Makes Concerning the Applicable Standards of Review Was Not at Issue in the Walton Case and Has Not Been Disapproved by That or Any Other Decision.

The Supreme Court in *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 reversed and remanded two of the cases cited by Petitioner, *NLRB v. Florida Citrus*, 388 F. 2d 630 and *NLRB v. Walton*, 286 F. 2d 16, only on the ground and to the extent that those cases appeared to rely on a special rule for testing the credibility of witnesses in discharge cases [Section 8(a)(3)]. The rule,

simply stated, was that the Board was forbidden to discredit an employer's testimony concerning its reasons for an alleged discriminatory discharge unless the testimony was impeached or contradicted in some manner by the General Counsel. Use of this special rule was held to be in conflict with the Court's decision in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474.

However, Petitioner has not cited the above cases for that proposition. Rather, they, as well as the others cited in Petitioner's Opening Brief [p. 27], are relied upon to support the following rule: In the determination of whether there is substantial evidence to support the Board's decision, a closer scrutiny of the record than might otherwise be required becomes necessary where the Trial Examiner has uniformly credited all of the General Counsel's evidence and disregarded all of the employer's. This directive is not in conflict with the "substantial evidence" rule set forth in *Universal Camera, supra*, as confirmed by the opinions of several circuits. See, for example, *NLRB v. Cleveland Trust Co.*, 214 F. 2d 95, 98 (6th Cir. 1954); *NLRB v. United Brass Works*, 287 F. 2d 689, 691 (4th Cir. 1961); *United Packinghouse Workers of America v. NLRB*, 210 F. 2d 325, 330 (8th Cir. 1954).

The rationale of these cases most certainly applies under the instant facts where the Board's Supplemental Decision rests almost totally on the credit given to certain of the General Counsel's witnesses, notably Hill and Barwise, and then only to certain portions of their testimony, but where, on the other hand, the testimony of witnesses called by Petitioner has been almost wholly disbelieved.

II.

The Board Has Not and Cannot, Realistically, Distinguish the Case at Bar From American Ship Despite Its Tortuous Attempts to Do So.

It is conceded by the Board that the Company may have had “justifiable grounds which . . . might have permitted [its action]” (Resp. Br. p. 14) and that the lock-out “could have been related to a simple desire to secure the fruits of collective bargaining.” (Resp. Br. p. 13). But, it continues, such was not the case, for Petitioner engaged in its lock-out for the wrong reasons and with a wrongful intent.

What were the Company’s alleged motives? The Board declares that one purpose of the lock-out was to “discourage employee interest in a disfavored union (here, presumably the Teamsters) and to promote a favored union (the Independent)”, citing *NLRB v. National Motor Bearing Co.*, 105 F. 2d 652 (9th Cir. 1939) and *NLRB v. Cowell Portland Cement Co.* (9th Cir. 1945) (Resp. Br. p. 13).

Aside from the fact that these cases were decided twenty years or more prior to *American Ship* and are wholly distinguishable, upon analysis, they *support* rather than detract from the contentions of Petitioner.

In *National Motor Bearing Co.*, *supra*, the employer had no collective bargaining contract with any union. When Union A began organizing its employees, the Company, without warning, shut down its plant, signed a contract with Union B, which had no showing of majority support, and conditioned the rehire of its employees upon joining Union B.

Cowell, *supra*, involved a similar but even more extreme situation. There the employer shut down his

plant in an attempt to force his employees to renounce their membership in majority Union A, with which the employer had an existing agreement, and conditioned rehire on joining minority Union B, which the employer had formed.⁷

The facts of the present case are not merely distinguishable, but present the complete reverse of those in the cases cited by the Board. Here the Independent Union which, *arguendo*, was locked out, represented a *majority* of Petitioner's employees, while the Teamsters were a *minority* union. The fact that the Independent was, at all times, a majority union, undominated and unassisted by the employer is, we submit, both crucial and decisive in the resolution of this case. For, as we previously pointed out, the Board in *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958) and related cases, has held that an employer may deal freely with a majority union and execute an agreement prior to the filing of an outside representation petition, *even though he may be aware of a rival union's organizing campaign*.⁸ The only difference between the instant case and *Deluxe Metal*, *supra*, is the existence of

⁷All would agree that the activities set forth in these cases, if true, would constitute violations of the Act. It was precisely this type of conduct which the Supreme Court had in mind when it stated in *American Ship*, "Similarly, it does not appear that the natural tendency of the lock-out is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. *There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union.*" [380 U.S. 312-313]. (Emphasis added).

⁸The Board does not answer this argument in its brief for the reason, we suggest, that the point is unanswerable.

an alleged lock-out. But just as an employer can deal with a majority union, so can he lock it out. *American Ship* held that the lock-out is an integral part of an employer's approach to collective bargaining. It certainly was not intended by the Supreme Court to hinge on the presence or absence of a competing union of unknown strength.

The case at bar has yet another reverse twist aspect. In the *National Motor Bearing, Cowell* and *American Ship* cases, *supra*, it was uniformly understood that the union being "discouraged" was the one which *had been locked out*. The argument in those cases was premised on the theory that the lock-out would result in the disenfranchisement of the target union and pressure employees to join another union which was on more favorable terms with the employer. The Board has completely turned this concept around. It argues that the lock-out "encouraged" the established union (the Independent) and "discouraged" membership in the contender (the Teamsters). No case known to Petitioner supports this unique contention.

Next, the Board sets forth as "controlling authority" the cases of *NLRB v. Security Plating Co.*, 356 F. 2d 725 (9th Cir. 1966) and *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466 (9th Cir. 1966) (Br. p. 14). Each of these cases found the Court confronted with an alleged discriminatory discharge violation within Section 8(a)(3) of the Act. As there is no discharge issue in the instant case, nor any lock-out issue in the former, these decisions are helpful, if at all, only by analogy, and can hardly be characterized as "controlling". Moreover, they merely restate the well-settled proposition that in discharge cases it is not

enough that a lawful cause exists for a termination if, in fact, the termination was made on the basis of an employee's union activities. Based on this rule, Respondent argues that although Petitioner might have had justifiable grounds for its lock-out, those grounds were not the motivating cause; rather, Petitioner acted for an illegal purpose.

Unquestionably, under *American Ship*, an employer's motivation may become critical in determining the propriety of a lock-out. However, we submit that "a desire to discourage negotiation through the Teamsters" (Resp. Br. p. 14), even if it existed, does not under the facts constitute *unlawful* motivation.

First of all, contrary to this Court's prior statement that Teamsters activities "were intimately interlaced with the events of April 1 and the earlier company-union contract negotiations" [352 F. 2d at 511], the evidence was that the first employee contact with the Teamsters did not take place until Sunday, 31 March, 1963 [Tr. 27; Pet. Br. pp. 14; 46].⁹ Management had no actual knowledge of Teamster activity until the fact was volunteered by employee Barwise *after the contract had been signed*, on 1 April [Tr. 36; 270-271].

But, says Respondent, Harry Tonkin, on the previous Friday evening, had told the men he knew they had been approached by the Teamsters and, while he was mistaken on this score, Tonkin was nonetheless motivated by a desire to forestall their organizing attempts (Br. p. 12).

⁹At page 13 of its brief, the Board notes with approval this Court's prior quotation regarding Teamster activity being "intimately interlaced", etc. Yet just one page earlier in its brief the Board has conceded that this was not the case. At page 12, note 3, it states, "The record does not disclose evidence of organizational efforts by the Teamsters among the Company's employees . . . prior to Sunday, March 31."

This contention is easily answered. Assuming Tonkin was “aware” of Teamster interest, although mistakenly, he certainly did not know its *extent*. Until presented with concrete evidence, in the form of a rival demand for recognition or a representation petition, the Company was obligated under the law to negotiate with the Independent Union. It could not have *assumed* that the Teamsters had majority support and ceased dealing with the Independent on that ground without violating Section 8(a)(5) of the Act. *NLRB v. Kellogg's Inc.*, 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962).¹⁰

It is undisputed that during the occurrence of the events here in question, the Petitioner entertained a genuine, good-faith belief that the Independent Union represented a majority of its employees. Therefore, its use of a lock-out to bring economic pressure to bear on that union to accept Petitioner's contract terms is fully protected by the law. The Board found the lock-out to be unlawful because it amounted to “coercion of (Petitioner's) employees” and “interference in the internal affairs of the union” (Resp. Br. p. 18). However, it is precisely this type of “coercion” which the *American Ship* court found to be the *lawful* counterpart of a union's right to strike.

¹⁰Under these circumstances, Tonkin's alleged statements that he “Did not want to negotiate with the Teamsters” and “Wanted a contract with the Independent Union” (Resp. Br. pp. 12; 3-4; 6; 16) were perfectly proper. The Petitioner was obligated to deal with the Independent, it was doing so, and there was no question presented, at that time and under the law, of dealing with anyone else.

III.

Conclusion.

For the reasons set forth herein, and in Petitioner's Opening Brief, it is submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

HILL, FARRER & BURRILL,
M. B. JACKSON,
KYLE D. BROWN,
Attorneys for Petitioner.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN

No. 21033

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, For the Use
and Benefit of CHICAGO BRIDGE & IRON
COMPANY, an Illinois corporation,

Appellant,

vs.

ETS-HOKIN CORPORATION, a California cor-
poration, and THE TRAVELERS INDEMNITY
COMPANY, a Connecticut corporation,

Appellees.

On Appeal from the United States District Court
for the District of Arizona

Appellant's Opening Brief

RYLEY, CARLOCK & RALSTON
FRANK C. BROPHY, JR.

Title and Trust Building
Phoenix, Arizona 85003

Attorneys for Appellant

SUBJECT INDEX

	Page
I. Jurisdictional Statement	1
II. Statement of the Case.....	2
A. Transaction Giving Rise to This Action.....	2
B. The Case in the District Court.....	3
Specification of Errors.....	6
A. Specification of Error No. 1.....	6
B. Specification of Error No. 2.....	6
Summary of Argument.....	7
A. Miller Act v. United States Arbitration Act.....	7
B. Jurisdiction of the Arizona District Court.....	8
Argument	8
Miller Act v. Arbitration Act.....	8
A. The Issue	8
B. Arbitration Is Prejudicial to Miller Act Rights.....	9
C. There Is No Substantial Judicial Authority for the Proposition That Miller Act Lawsuits Are Properly Referable to Arbitration Under the United States Arbi- tration Act	21
D. Federal Arbitration Act Does Not Apply Because the Controversy Here Is Not Referable to Arbitration as a Matter of Public Policy.....	25
Jurisdiction of Arizona District Court to Vacate Award.....	28
Conclusion	32

TABLE OF AUTHORITIES CITED

CASES	Pages
Agostini Bros. Bldg. Corp. v. U. S. ex rel Virginia-Carolina Electrical Works, Inc., 142 F.2d 854 (4th Cir., 1944).....	22, 23, 24, 25
Application of Cohen, 52 NYS 2d 671 (Sup. Ct. 1944), aff'd 53 NYS 2d 467 (1945).....	26
Application of Diamond, 80 NYS 2d 465 (Sup. Ct., 1948), aff'd 79 NYS 2d 924 (1948).....	25
Bernhardt v. Polygraphic Co., 350 U.S. 198.....	12, 13
Bradford Novelty Co. v. Manheim, 156 F. Supp. 489 (DCSD NY—1957)	32
Electronic & Missile Facilities Inc. v. U.S. ex rel. Moseley, 306 F.2d 554 (5th Cir. 1962).....	9, 15, 21
Ferguson v. Ford Motor Co., 77 F. Supp. 425 (DCSD NY —1948)	31
Gaddis Mining Co. v. Continental Materials Corp., 196 F. Supp. 860 (D.C. Wyo.—1961).....	30
Hill v. Hill, 104 NYS 2d 755 (Sup. Ct., 1951).....	26
Kingswood Management Corp. v. Salzman, 70 NYS 2d 692 (1947)	25
Swislocki v. Spiewak, 75 NYS 2d 147 (1947).....	26
U.S. ex rel, Air-Con, Inc. v. Alcon Development Corporation, 271 F.2d 904 (Cir. 4, 1959).....	23, 25
U.S. ex rel Bryant Electric Co. v. Aetna Casualty & Surety Co. 297 F.2d 665, CA2, 1962.....	27
U.S. ex rel Industrial Engineering and Metal Fabricators, Inc. v. Erie Elevator Corporation et al., 214 F.S. 947 (D.C. Mass., 1963),	23, 26
U.S. ex rel Seaboard Surety Company v. Electronic & Missile Facilities, Inc., et al., 206 F.S. 790 (District of Puerto Rico).....	23, 26
U.S. ex rel, Trucco & Sons Co. v. Bregman Construction Corp., 256 F.2d 851 (7th Cir. 1958).....	22, 24, 25

	Pages
Wilko v. Swan, 107 F.S. 75 (D.C. So., New York).....	10
Wilko v. Swan, 346 US 427 (1954).....	9, 12, 14, 22, 24, 28
Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184 (D.C. Del., 1930)....	10, 25

STATUTES

28 U.S.C.:	
Section 1332	1, 30, 31
Section 1291 and 1292.....	2
40 U.S.C. 270:	
a(a)	30
b(b)	30
40 U.S.C. 270 b(a) & (b).....	9
Heard Act, Chap. 280, 28 Stat. 278.....	8
Miller Act, 40 U.S.C. Section 270 et seq.....	1, 3, 6, 7, 8, 19, 21, 27
United States Arbitration Act, Section 3, 9 U.S.C.....	5, 10, 28, 29
9 U.S.C. Sections 10 and 11.....	8, 13, 29

TEXTS

Federal Arbitration Act in 12 Virginia Law Review 265.....	10
Handbook and Guide to Commercial Arbitration, pub. by Chamber of Commerce of the State of New York (1932) p.6	11
House Report 1263, 74th Cong. 1st Session, June 19, 1935.....	8
Moore, Federal Practice and Procedure (Second Edition) Vol. 1, page 1335.....	31
Moore: Federal Practice (1964 Ed.), Vol. 5, Par. 43.08.....	20, 21

31, 1966. T.R. 69. Notice of Appeal was filed on March 25, 1966. T.R. 180. Timely orders extending the time for filing the Record on Appeal were made on March 4, 1966, June 13, 1966 and July 22, 1966 by which the time for filing the Record on Appeal was extended to September 1, 1966. The Record was filed with this Court on August 26, 1966. The jurisdiction of the Court to determine this appeal rests on 28 U.S.C. Section 1291 and 1292.

II.

STATEMENT OF THE CASE

A. Transaction Giving Rise to This Action.

On or about August 22, 1962, Appellee, Ets-Hokin Corporation, (then known as Ets-Hokin & Galvan, Inc., a corporation and hereinafter sometimes referred to as Ets-Hokin) and Appellant (hereinafter sometimes referred to as CB&I) entered into a Subcontract Agreement (Exhibit "A" to Motion For Stay of Action Pending Arbitration, Tr. 11, and Chicago Bridge & Iron Company General Specifications which are a part of Appellant's Exhibit 83 attached to Reporter's Transcript of Arbitration Proceedings (RTAP)), wherein CB&I agreed to perform certain construction work called for under the Ets-Hokin's general contract with the United States Bureau of Reclamation for the completion of the Glen Canyon Dam Project, Page, Arizona. (The general contract is technically identified as Contract No. 14-06-D-4429, and the specifications thereto are referred to as Specification No. DC-5750. In addition to the general contract and the specifications, there was a Bid Schedule which for bidding purposes constituted a breakdown of the work and material set forth in the specifications.) The Subcontract covered all the general contract work under Bid Schedule Items 129 and 130, and a certain portion of the work under Item 79.

During the course of the Subcontract, a dispute arose between CB&I and Ets-Hokin as a result of a demand by the latter that the former perform certain general contract work included under Bid Schedule Item 79 generally described as the cooling and prestressing of the spiral cases.

These spiral cases are the metal conduits by which the water from the penstocks is carried immediately into the turbines in the power plant below the dam. Graphically, the cases connect up with the penstocks, which bring the water from the reservoir behind the dam, and lead to and fit closely around the individual turbine units. The spiral cases are embedded in concrete and it is during this embedment that the general contract specifications under Item 79 require the cases to be filled with water and then placed under a certain pressure. The temperature of the water and the pressure within the cases must be maintained for certain periods during and after the placement of the concrete.

CB&I refused to do this work upon the grounds that its Subcontract did not require it to do so, declaring that it was obligated only to perform those work items specifically outlined in the Subcontract under Item 79 (See Attachment to Subcontract, Tr. 13). Ets-Hokin then proceeded to do the work and to backcharge CB&I therefor.

Subsequently, on July 7, 1964 CB&I filed the lawsuit below to collect the sum withheld as backcharges, and Ets-Hokin's bonding company, Appellee Travelers Indemnity Company, was joined as a defendant under the terms of its bond and 40 U.S.C. 270 et seq.

B. The Case in the District Court.

The complaint in the lower court alleged that the Defendant Ets-Hokin had wrongfully retained from subcon-

tract proceeds payable to CB&I the sum of \$33,167.41 as and for backcharges to cover costs of prestressing of the spiral cases incurred by it; and that Ets-Hokin was threatening to withhold additional sums, which in fact it did, so that as of this date the total backcharges for prestressing costs amount to \$37,077.56.

Immediately after the complaint was filed, Ets-Hokin served by mail a Demand for Arbitration upon CB&I under a letter dated August 14, 1964, Tr. 15, invoking Article 23 of the standard printed form of its Subcontract. This Article provides:

“ARBITRATION: In case of any dispute between the parties as to the interpretation of this agreement or as to a change in the Subcontract price of Subcontract time due to the issuance of a change order, or with respect to any other matter arising out of or in connection with this Subcontract or its performance, either party may demand that the dispute be submitted to arbitration. The demand shall be in writing, shall be served on the other party and shall specify the arbitrator chosen by the party making the demand. Within 7 days after receipt of the demand, the other party shall appoint an arbitrator, by written notice served on the party making the demand. The two arbitrators so chosen shall select a third arbitrator. The decision of any two arbitrators shall be binding and conclusive on the parties, shall be in writing and shall be a condition precedent to any right of legal action. In no case shall submission of a matter to arbitration be a cause for delay or discontinuance of any part of the work. Each party shall bear the expense of its own arbitrator and the expense of the third arbitrator and other costs of arbitration shall be divided equally between the parties.”

On August 21, 1964, Ets-Hokin filed in the lower court a Motion For Stay of Action Pending Arbitration, and cited

as authority for the motion, Section 3 of the *United States Arbitration Act*, 9 U.S.C. 3, which provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

CB&I opposed the Motion For Stay of Action, Tr. 20-26, but on October 26, 1964 the District Court granted the Ets-Hokin motion, Tr. 27.

Thereafter, the dispute proceeded to Arbitration before three arbitrators who held a hearing in San Francisco on July 6, and 7, 1965. (See Reporter's Transcript of Proceedings hereinafter referred to as RTAP.) On or about August 30 or September 1, 1965, two of the three arbitrators rendered their award including therein an opinion, Tr. 54-57.

On November 24, 1965, CB&I filed a Motion To Vacate The Stay Order entered by the Arizona District Court on October 26, 1964 and also filed as an alternate, a Motion To Vacate The Arbitration Award, Tr. 28. The motions were opposed by Ets-Hokin. The Court heard oral argument and on January 31, 1966 denied both of the CB&I motions, Tr. 69. Subsequently, this appeal was taken as previously stated.

Likewise, this Court should be aware of the fact that, in order to preserve its rights under Section 10 of the Arbitration Act on November 29, 1965, CB&I filed in the United

States District Court, Northern District of California, matter No. 44430, entitled Application for Order to Set Aside Arbitration Award. On December 20, 1965, Appellees also filed in the United States District Court, Northern District of California, matter No. 4452, entitled, Petition to Confirm Arbitration Award. These matters were consolidated for a hearing held before the Hon. Judge Zirpoli on March 30, 1966. These matters are still awaiting the decision of that Court.

SPECIFICATION OF ERRORS

The rulings of the United States District Court, District of Arizona (Phoenix Division), the correctness of which Appellant submits to this Court for review, are as follows:

A. Specification of Error No. 1.

The District Court erred in ruling that Appellant was not entitled to have the Stay Order of October 26, 1964 vacated so that it could proceed with the prosecution of its claim against the Appellees before the said District Court. The Court reasoned that Article 23 of the Subcontract, providing for arbitration of disputes between the parties thereto, and the policy of the United States Arbitration Act favoring the enforcement of Arbitration clauses, overrides the right granted to the Appellant under the *Miller Act* (40 U.S.C. 270) to file and prosecute to judgment its claim against Ets-Hokin and its surety, Travelers Indemnity Company, in said District Court.

B. Specification of Error No. 2.

If the District Court was correct in sustaining its Order of October 26, 1964, then it erred in refusing to vacate the Arbitration Award upon the grounds that it did not have the jurisdiction to entertain Appellant's Alternate Motion

to Vacate the Arbitration Award. The Arizona District Court apparently based its conclusion upon the fact that the Arbitration Award had been entered in San Francisco, California, which fact, according to Appellee's argument to the Court, under the United States Arbitration Act gave exclusive jurisdiction of the Motion to the United States District Court for the Northern District of California. Appellant contends that as the Court of original jurisdiction of the dispute, the Arizona District Court had the jurisdiction to hear and determine matters concerning the Arbitration Award.

SUMMARY OF ARGUMENT

A. Miller Act v. United States Arbitration Act.

Appellant contends that under the *Miller Act*, supra, it has the right to prosecute its claim against the Appellees for the wrongful backcharges in the United States District Court, District of Arizona. It argues that the *Miller Act* grants to the Appellant the right to have a judicial determination of its claim against Ets-Hokin and its surety, Travelers Indemnity Company, which right overrides the arbitration provision of the Subcontract (Article 23) and the policy of the United States Arbitration Act. Appellant will argue that its right of recovery against the Appellees would be seriously impaired by arbitration and proposes to demonstrate the impairment by reference to the actual arbitration that took place in this instance. Further substantiation of Appellant's contention is to be found in the fact that vindication of Appellant's rights requires a legal construction of the Subcontract, something which three laymen are not trained to do.

B. Jurisdiction of the Arizona District Court.

Appellant contends that 9 U.S.C. Sections 10 and 11, (United States Arbitration Act) do not confer exclusive jurisdiction upon the District Court for the Northern District of California to vacate, modify or correct the Arbitration Award, and that these sections of the statute are more in the nature of venue provisions. The gravamen of the dispute in both the District Court and the Arbitration proceeding was the *Miller Act* rights of the Appellant, and under the *Miller Act*, the District Court in Arizona was the proper forum. Since the Arizona District Court was properly vested with jurisdiction over the original dispute, it can justifiably retain jurisdiction over the arbitration.

ARGUMENT

MILLER ACT v. ARBITRATION ACT

Right Granted by Congress to Judicial Determination of Miller Act Claim Cannot Be Waived in Advance by Parties or Overridden by Policy of Federal Arbitration Act.

A. The Issue.

Admittedly, it is the intent of the Federal Arbitration Act to give effect to agreements for arbitration and within the boundaries of Federal jurisdiction, to countermand the traditional legal precedents against enforcement of arbitration agreements. The Federal Arbitration Act was enacted in 1925. Ten years later, on August 24, 1935, the Miller Act was enacted into law. This Act superseded and repealed previous legislation known popularly as the *Heard Act*, Chapter 280, 28 Stat. 278. This latter Act had provided only one bond for the benefit of both the United States and the subcontractors and materialmen, and subcontractor's rights under this bond were subordinate to the rights of the United States (House Report 1263, 74th Cong. 1st Session, June 19, 1935). Under the Miller Act, a separate

bond was provided for the benefit of the subcontractors who could, if not paid within ninety (90) days of the completion of their work, bring suit on the bond in the District Court where the contract was to be performed and executed (40 USCA 270 b(a) & (b)).

The question, therefore, before the Court on this Appeal is: Can a subcontractor be precluded from exercising his rights under 40 USCA 270 b(a) & (b) by a previous agreement contained in the small print of a printed form of subcontract requiring the subcontractor to arbitrate all disputes arising under the subcontract?

B. Arbitration Is Prejudicial to Miller Act Rights.

It was the position of the Appellant originally in opposition to the Ets-Hokin Motion For Stay of the District Court proceedings that arbitration would prejudice the rights secured to it under 40 USCA 270 b(a) & (b), in that vital and complex legal questions would be determined by an untrained panel of laymen, rather than by a duly appointed and qualified Federal judge. Appellant's claim does not and did not merely involve the reasonableness or unreasonableness of the sums claimed by Ets-Hokin as backcharges. The outcome of Appellant's claim depends upon the application of the Law of Contracts and the adoption of appropriate rules of construction to Appellant's Subcontract with Appellee, Ets-Hokin Corporation. At the time of the Ets-Hokin motion, Appellant pointed to the case of *Wilko v. Swan*, 346 US 427 (1954) and *Electronic & Missile Facilities Inc. v. U.S. ex rel. Moseley*, 306 F.2d 554 (5th Cir. 1962) for the proposition that where the Miller Act dispute involved complex or sophisticated legal issues which cannot be readily resolved by Arbitrators untrained in the law, the Appellant's right to sue under the Miller Act should prevail over the Appellee Ets-Hokin's

claim for Arbitration under the Federal Arbitration Act.

As Judge Goddard noted in *Wilko v. Swan*, 107 F.S. 75 D.C. So., New York), Section 3 of the Federal Arbitration Act does not authorize the Court to stay an action unless it is "satisfied that the issue involved in such suit is referable to arbitration." From time to time, Courts have, either upon grounds of public policy as in the *Wilko v. Swan* case, or upon grounds that the particular issues do not lend themselves to arbitration; *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184 (D.C. Del., 1930) refused to enforce arbitration agreements. In fact, the arbitration process, as established in the Arbitration Act, is designed primarily for the determination of business and commercial disputes. The statute in bill form was submitted to Congress under the sponsorship of the Committee on Commerce, Trade and Commercial Law of the American Bar Association. In an article on the *Federal Arbitration Act in 12 Virginia Law Review* 265, 281, Mr. J. H. Cohen, who for many years took an active part in advocating arbitration legislation in the United States, said:

"Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of the law—the questions of law which arise out of the daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned."

Turning purely legal issues over to arbitrators untrained in the law would operate in this instance to Appellant's

prejudice precisely because Appellant's claim and rights are primarily dependent upon a proper formulation and application of the law of contracts to the Appellant's Subcontract. Expertise in law rather than a purely technical engineering background is a prime requirement for a just decision in this controversy. This is one of those cases in which arbitration authorities, themselves, have expressed doubt.

"The power to disregard rules of procedure and evidence out of law, which is one of the great advantages of proper arbitration, is capable of becoming an instrument of abuse and oppression in such hands, (i.e., in the hands of laymen)—just as a motor car driven by an unskilled . . . driver can do great damage." *Handbook and Guide to Commercial Arbitration*, pub. by Chamber of Commerce of the State of New York (1932) p. 6.

Admittedly, technicians in the hydro-electric plant construction industry are competent and desirable judges of such issues as custom and usage in the industry, labor costs, the functions of various trades and the significance and relation of specific construction processes to the overall construction process. But substantial legal issues, such as "burden of proof", "parol evidence", "the doctrine of merger in contracts", "competency of witnesses" and "promissory estoppel" and rules governing construction of vague phrases such as "including but not limited to" were involved in the present dispute and were extremely important to the right of the Appellant to recover upon the payment bond of the Appellee, Ets-Hokin Corporation.

For example, in the Arbitration hearing, Appellant put on what in a courtroom would have been its case-in-chief, i.e. introduction of the basic Subcontract, testimony as to

its performance and the refusal of Ets-Hokin to pay the amounts withheld as backcharges. Appellant then asked the Board for an award, arguing to the Board that the Subcontract was clear and unambiguous and that, unless the Appellee, Ets-Hokin could demonstrate that it was vague, uncertain and ambiguous, or, without going outside the terms of the Subcontract demonstrate prestressing of the spiral cases was a part of the Subcontract work, Appellant should be entitled to an award in the sum of the backcharges. The Board chose not to consider the question of whether the Subcontract was vague and ambiguous or whether prestressing was a part of the Subcontract as written, but proceeded to hear and take evidence that was extrinsic to the written Subcontract; namely, the various proposals of the Appellant that resulted in the written Subcontract, and cross-examination of the Appellant's witness concerning conversations and events during subcontract negotiations. The parol evidence rule was flagrantly violated as the whole history of the Subcontract's negotiation and the duties of Appellant under other subcontracts not involving Ets-Hokin came into the record. The doctrine of the merger of all prior understandings and agreements in the final written Subcontract was completely ignored.

It was this disregard of legal procedure, concepts and rules throughout the arbitration which operated to Appellant's prejudice. Under the arbitration process, one cannot appeal to have the award set aside because the parol evidence rule, or the doctrine of merger of contracts or the rules as to who has the burden of proof are misconstrued, misapplied or ignored. As noted, in *Wilko v. Swan*, supra, and affirmed in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198:

“Interpretations of the law by the Arbitrators are not subject, in the Federal Courts, to judicial review

for error in interpretation. The U. S. Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English Law. (Wilko v. Swan at 436, 437)".

And again, to quote the Court in the *Bernhardt case*, supra:

"The change from a Court of Law to an Arbitration panel may make a radical difference in the ultimate result . . . arbitrators do not have the benefit of judicial instruction in the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a Court trial; and judicial review of an award is more limited than judicial review of a trial."

Instead, the Court is limited to the grounds set forth in Sections 10 and 11 of the Federal Arbitration Act:

Section 10. Same; vacation; grounds; rehearing

"In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made

has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

Section 11. Same; modification or correction; grounds; order

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

As an abstract proposition, that statutory rights may be impaired if subject to the erroneous legal conclusions of a lay arbitration board, which are not subject to review by an appellate court, need hardly be demonstrated, particularly where the claim or right involves the legal construction of a statute and a contract. However, the instant case offers a vivid demonstration if such is needed.

The Supreme Court in *Wilko v. Swan*, supra, felt that the rights of a purchaser against a seller under the Securities Act of 1933 to be effectively secured required judicial enforcement:

"Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness

in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' . . . cannot be examined."

And Chief Judge Tuttle in his majority opinion in the case of *Electronic & Missile Facilities, Inc. v. U. S. ex rel. Moseley*, supra, at Page 557 conceded:

"If it could be shown that disputes arising under the Miller Act involve complicated and sophisticated legal issues which cannot be readily resolved by arbitrators untrained in the law, we would perhaps be more willing to read into the Miller Act provision giving Appellee the right to sue in the federal courts a prohibition against having the dispute settled anywhere else. But such is not the case. This dispute involves nothing more than the rights and liabilities of two business concerns under ordinary business contracts."

This thesis of the arbitrators' inability to handle the legal issues involved in this dispute was advanced by Appellant in its original opposition to the Ets-Hokin Motion For Stay of Proceedings, Tr. 6. It was not as susceptible of concrete demonstration at that time as it is now when the arbitration proceedings are available for examination.

The apparent lack in the arbitrarators' understanding of the parol evidence rule, the concept of the burden of proof

and the doctrine of merger of prior agreements obviously led them into the confusion which resulted in their award and findings. Unable to relate the pertinent issues raised by Appellant's complaint below, Tr. 1-5, and the Ets-Hokin Demand For Arbitration, Tr. 15-17, under the plethora of evidence, much of it incompetent and immaterial to these issues, to the decision they were called upon to make, the Board ended up concluding that Appellant had not agreed to do the prestressing in its Subcontract, but that, nevertheless, it should be bound by an oral offer made prior to the final Subcontract negotiations (See paragraphs 8, 11 and 12 of the Arbitration Award Tr. 55 and pages 82-89, Vol. 1, RTAP).

Appellant made many efforts to impress upon the arbitrators that their primary function was to determine whether or not the subcontract of August 22, 1962 required the Appellant to perform the prestressing work outlined under paragraph 208g(2) of the specifications to the general contract (See page 337 of Defendant's Exhibit "B", RTAP). This was the reason why the Appellant stressed the importance of the parol evidence rule; namely, to keep the arbitrators' attention focused on the Subcontract document. (See pages 13, 15, 19, 20, 26, RTAP.) At the very beginning of its closing statement, Appellant reminded the Board to keep its attention on the Subcontract Agreement (See pages 309, 310, RTAP).

No doubt it was just such insistence on the Appellant's part, which impelled the Board to its finding that Appellant, under the written Subcontract, had not agreed to do the prestressing. See paragraphs 8 and 12, Tr. 55. Equally, however, it was the Board's inability to appreciate the legal consequences of such a finding which led it to enter an award against the Appellant. Such a result, Appellant

submits, would never have occurred in a Court of law upon such findings; or, if it had, such a result would never survive an appeal.

Appellant argued its case to the Board on the theory that the prestressing work was not called for by the written Subcontract and Appellees advanced their case on the theory that the disputed work was called for by the written Subcontract, arguing that the phrase "shall include but not necessarily be limited to the following", Tr. 11, referred to the prestressing items which, though not enumerated in the Subcontract attachment, Tr. 13, were a subcontract obligation (See pages 16, 74, 75, 76, 105, 106, 322, 323, RTAP). The arbitrators apparently agreed with the Appellant's theory, but still found that the Appellant was obligated to perform the prestressing because of the earlier oral offer which the evidence showed was not accepted either orally or in writing by any officer of the Appellee Ets-Hokin authorized to accept such an offer in a binding agreement.

The only competent evidence in the record on the question of whether the parties had ever at any time reached an agreement as to the cooling and prestressing work involved two conversations: one between J. Graham Daniels, the CB&I contracting officer and Paul Ristine, the Ets-Hokin project foreman; and the other between Daniels and Louis Bruni, a Vice President of Ets-Hokin. It was Bruni who eventually awarded the Subcontract to Daniels.

Early in the Subcontract negotiations, Daniels made an offer to do the prestressing to Ristine if this would secure to CB&I the Subcontract. Ristine replied that Ets-Hokin would want CB&I to do the prestressing, RTAP 81-82. However, negotiations with Ristine proved fruitless, RTAP 77-78. Ristine did not have the authority to award Sub-

contract, RTAP 202. Then Daniels began to negotiate with Bruni, a man who, he had concluded, had the power to award a subcontract to CB&I. The negotiations began in earnest, and the original subcontract price proposal began to change. Once again, with a definite subcontract price in mind, Daniels offered to supply a standby operator for the prestressing work if that would clinch the negotiations, RTAP 83. The testimony does not indicate that Bruni accepted the offer, RTAP 82-90. The Subcontract was not awarded at that time. At a later date, after the subcontract price was revised downward and CB&I had agreed to do an extra item of work, the Subcontract was awarded by Mr. Bruni. Ets-Hokin prepared the Subcontract using its standard form and adopting the language of a confirming letter from Mr. Daniels on the date Bruni agreed over a telephone to give CB&I the Subcontract. The Subcontract document itself was signed, not by Bruni, but by Robert Lauter, Executive Vice President of Ets-Hokin. Neither Bruni nor Lauter were called as witnesses by Ets-Hokin.

As finally constituted, the Subcontract Agreement consisted of the following documents:

- a) The Ets-Hokin printed form of subcontract with typed attachment, Tr. 11-14.
- b) The confirming letter from Daniels dated August 15, 1962. See Defendant's Exhibit D to RTAP.
- c) The general conditions of the governing specifications No. DC 5750. (Not a part of this record)
- d) Printed General Specifications of CB&I to be found as Exhibit 83 to RTAP.
- e) Those pertinent paragraphs of the governing specifications No. DC 5750 which relate to Bid Schedule Items 129, 130 and that portion of Item 79 included in the Subcontract.

Given the fact that negotiations for the Subcontract extended over an approximate period of three months, and that the ultimate document was complex and fairly definitive, representing the "give and take" of such negotiations, including a revision downward of the original subcontract offer of \$1,046,700.00 (Defendant's Exhibit F, RTAP) to \$592,500.00, it can be seen that the arbitrators' imposition of a \$16,850.45 liability upon CB&I based upon the oral offers outlined above constitutes a severe mauling of the Appellant's legal rights. The result seriously puts in question the value of written contracts and the rights of the Appellant to enforce its claim against the bond provided under the terms of the *Miller Act*.

Additionally, Appellant's procedural rights were prejudiced under the arbitration. It became the Appellant's burden to prove that the disputed work was not a part of the agreement between the parties. Normal court procedure would have required the Appellees, after Appellant had placed the Subcontract into evidence and established evidence as to its performance and the alleged wrongful retention of subcontract proceeds, to have proceeded with its defense; namely, that the Subcontract had not been performed, that prestressing was an obligation of the Appellant under the Subcontract, that Appellant had defaulted in this obligation and that, as a result, the Appellee Ets-Hokin had suffered XYZ amount of damages. Then, the Appellant would have proceeded to have put on its rebuttal evidence.

As it turned out, a great deal of Appellant's rebuttal evidence was exposed to Appellees and their witnesses before the Appellees were required to put on their case. This resulted from the cross-examination of Appellant's only intended witness in its case-in-chief, J. Graham Daniels,

upon matters outside of the scope of the direct examination and more directly pertinent to the Appellee's case, most of which Appellant argued then and argues now is based upon parol evidence, upon matters beyond the written contract. During the course of such cross-examination, much parol documentary evidence was brought up by the Appellees, as, for example, the Baldwin-Lima-Hamilton subcontract (RTAP, pages 29-31). In addition, Appellant was required, after the cross-examination of J. Graham Daniels, to put on the testimony of its rebuttal witness F. J. Kelly (RTAP 107-109). This was premature since Mr. Kelly's testimony was intended to be used primarily to rebut the testimony of Ets-Hokin's principal witnesses, Ristine and Barna. Indeed, if the parol evidence rule had been strictly applied, Appellant would probably not have used Mr. Kelly as a witness, unless it would have been to confirm Mr. Daniels' statements to the effect that CB&I had completed its performance under the Subcontract.

There is nothing quite so helpful to the adverse parties as telling them in advance how one proposes to rebut their evidence and testimony, particularly when much of the telling is done under the skillful cross-examination of the adverse parties. As the testimony of F. J. Kelly demonstrates, it was necessary for the Appellant, in anticipation of the Appellees' parol testimony to submit parol evidence of its own to controvert the anticipated evidence of the Appellees. Kelly's testimony involved itself primarily in technical explanations of prestressing and cooling and an explanation of events occurring during the performance of the work and after the execution of the agreement (Pages 109-177, RTAP).

In Federal Courts generally, the burden of proof has been characterized as a substantive right. *Moore: Federal*

Practice (1964 Ed.), Vol. 5, Par. 43.08. The right protected by the parol evidence rule is likewise a substantive right. Thus, Appellant's belief is that the procedural deficiencies of the arbitration hearing not only contributed to the confused findings and conclusions of the Arbitration Board, but to a diminishment of Appellant's substantive rights.

C. There Is No Substantial Judicial Authority for the Proposition That Miller Act Lawsuits Are Properly Referable to Arbitration Under the United States Arbitration Act.

The Fifth Circuit in *Electronic & Missile Facilities, Inc. v. Moseley*, supra, said that a subcontractor's *Miller Act* lawsuit could be stayed for arbitration; but the Supreme Court on appeal remanded the case for trial in the District Court on the issue of fraud in the inducement of the Subcontract without reaching or discussing the *Miller Act* issue or instructing the lower court how to handle the issue should the fraud charge be decided adversely to the Plaintiff (374 U.S. 167, 1963, P. 172-173). However, in a concurring separate opinion, Justices Warren and Black noted that the Court's disposition of the appeal "leaves open questions of great importance to laborers and materialmen who under the *Miller Act* are entitled to have their controversies settled in independent courts of law."

"(1) Can a member of the special class of laborers and materialmen which Congress, in the public interest, has protected by fixing the venue for their claims under the Miller Act in a particular federal court deprive himself of that kind of remedy as a condition of his obtaining the employment or the purchase of his materials?

(2) Can any person before any dispute has arisen, agree to arbitrate all future disputes he may (*374 US 173) have and *thereby lose his right to go to court to try his claim according to due process of law?

(3) Can the Arbitration Act, in light of its language and legislative history, be applied to laborers and materialmen or to construction projects subject to the Miller Act?

(4) Is a construction project, like the one in this case, one 'involving commerce' so as to come within the restriction scope of the Arbitration Act?"

The case of *Agostini Bros. Bldg. Corp. v. U. S. ex rel Virginia-Carolina Electrical Works, Inc.*, 142 F.2d 854 (4th Cir., 1944) did not concern itself with the question of any possible conflict with the Miller Act. The case involved an action by a subcontractor for labor and materials furnished and the District Court had denied a stay of proceedings on the ground that since the contract was not one involving maritime transactions or transactions within interstate commerce as defined in Section 2 of the Arbitration Act, the Act did not apply. The Fourth Circuit found that Section 3 of the Arbitration Act which provides for stays pending arbitration was not limited to the transactions defined in Section 2. The United States Supreme Court when faced with the apparent precedent of the *Agostini* case in its deliberations in *Wilko v. Swan*, 346 US 427, 435 decided that *Agostini* was not really a case in which arbitration proceedings would lessen the effectiveness of the claimant's remedy since it involved only a determination of the *amount* of money due under a contract.

U.S. ex rel, Trucco & Sons Co. v. Bregman Construction Corp., 256 F.2d 851 (7th Cir. 1958) was a Miller Act action by a subcontractor against his principal wherein the principal, Bregman sought arbitration under the subcontract. The District Court found that Bregman had waived his right to arbitrate by filing a previous action against the subcontractor Trucco's bonding company. The circuit court

sustained the district court. There was no issue or discussion of Miller Act priority over the Arbitration Act.

U.S. ex rel Seaboard Surety Company v. Electronic & Missile Facilities, Inc., et al., 206 F.S. 790 (District of Puerto Rico) met the issue of arbitration vs. Miller Act rights head on and decided on the basis of the *Agostini* Case, *supra*, and *U.S. ex rel, Air-Con, Inc. v. Alcon Development Corporation*, 271 F.2d 904 (Cir. 4, 1959) that the court was bound to grant the authority of Section 3 of the Arbitration Act. In view of the issues decided in the *Agostini* Case, it is difficult to see how the court concluded that the *Agostini* Case was precedent for the proposition that the Arbitration Act will prevail over the policies of the Miller Act and the rights of claimants thereunder.

In the *Air-Con, Inc. v. Alcon Development Corp.* Case, *supra*, under a contract arbitration clause very similar to the one in the Plaintiff's subcontract, the district court ordered a stay of proceedings pending arbitration which order was affirmed by the Fourth Circuit on appeal. While this was a Miller Act case:

"The Defendants concede that the provisions of the Federal Arbitration Act (9 USC Sec. 1 through 14) are not applicable here and that, if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia."

Thus there was no issue in this case of Miller Act v. Arbitration Act.

In *U.S. ex rel Industrial Engineering and Metal Fabricators, Inc. v. Eric Elevator Corporation et al.*, 214 F.S. 947 (D.C. Mass., 1963), a Miller Act plaintiff moved to strike that portion of the defendant's defense which sought to stay proceedings pending arbitration pursuant to a subcontract

provision calling for arbitration in New York City. The plaintiff contended that the arbitration provision was invalid because it ousted the Federal Court of its jurisdiction and frustrated "the purpose of the Miller Act with its provision for bringing of suit in the district in which the contract was to be performed;" in this case, Massachusetts. The Court held that the Arbitration Act language was broad enough to encompass Miller Act suits and that the rights created by the Act could be subjected to an arbitration agreement unless the right was one "of a character inappropriate for enforcement by arbitration". The court found that the Supreme Court in *Wilko v. Swan*, supra, had approved Miller Act cases as the type of case "in which arbitration is not only appropriate but useful", and then proceeded to cite the *Air-Con, Inc.*, *Bregman Construction Corp.* and *Agostini* cases as authority for the proposition that the provisions of the Arbitration Act are applicable to Miller Act cases. The court concluded that the plaintiff had:

"offered no convincing argument that the Miller Act provision, even if for plaintiff's protection, cannot be waived by a free contract of the parties to arbitrate their differences at some other place. The Act gives the plaintiff the right to have his claims decided by the court. If, plaintiff can agree to waive this right and submit the case for decision by an arbitration tribunal, he should certainly be able to agree to have the arbitration take place outside the district".

The Massachusetts District Court reads too much into the Supreme Court's passing reference to the *Agostini* Case in noting that experience under the Arbitration Act "raises hope for its usefulness both in controversies based on Statutes or on standards otherwise created". It should be noted that in *Wilko v. Swan*, the Supreme Court went on to qualify this generous statement by saying that the hospitable

attitude of the Congress and the courts towards arbitration did not solve the question of the validity of the arbitration agreement involved in that case.

Further, the Massachusetts court in the *Eric Elevator Corporation* Case clearly misinterpreted the holding of the *Agostini*, *Air-Con, Inc.* and *Bregman* cases; and, finally, it appears that the court and the parties were primarily concerned with the issue of venue, i.e. the right to have the issues decided in New York or Massachusetts. In the light of the facts of the present case, the court's reasoning is shallow, summary and unconvincing.

D. Federal Arbitration Act Does Not Apply Because the Controversy Here Is Not Referable to Arbitration as a Matter of Public Policy.

Public policy has on occasion been a ground for declaring a matter not referable to arbitration. Thus, in *Kingswood Management Corp. v. Salzman*, 70 NYS 2d 692 (1947), the New York arbitration law, upon which, according to *Zip Mfg. Co. v. Pep Mfg. Co.* 44 F2d 184, 185 (DC Del.—1930) the Federal Arbitration Act was patterned, was held inapplicable to a controversy involving an attorney's fee in a treble damage suit under the Federal Emergency Price Control Act.

“The Emergency Price Control Act was adopted from urgent reasons of public policy which the Congress did not intend to turn over to private Arbitrators to administer. (P. 693)”

In *Application of Diamond*, 80 NYS 2d 465, 467 (Sup. Ct., 1948), aff'd 79 NYS 2d 924 (1948), a motion to stay a stockholder's derivative action in order that the controversy could be arbitrated was denied, on the ground, inter alia, that an agreement to arbitrate the issue there involved “would be unenforceable as against public policy”.

In *Application of Cohen*, 52 NYS 2d 671 (Sup. Ct. 1944), aff'd 53 NYS 2d 467 (1945), a stay pending arbitration was denied in a proceeding to dissolve a closed corporation because of disagreement of the parties.

As a matter of public policy, arbitration under the New York Arbitration statute has been deemed inappropriate with respect to the custody of children and rights of visitation. *Hill v. Hill*, 104 NYS 2d 755 (Sup. Ct., 1951), and with respect to the distribution of a decedent's estate, *Swislocki v. Spiewak*, 75 NYS 2d 147 (1947).

Judge Tuttle of the Fifth Circuit Court of Appeals in *Electronic & Missile Facilities, Inc. v. United States*, supra, in reversing the decision of the District Court for the Middle District of Georgia which had denied a motion to stay a lawsuit pending arbitration, concluded that the Arbitration Act prevailed over the Miller Act in that instance for several reasons:

1. The clear congressional intent to favor arbitration of disputes as expressed in the Arbitration Act.
2. The lack of any Miller Act legislative history which would support the inference that in adopting the Miller Act "Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a Federal Court."
3. The lack of any demonstration of "how or why" the Miller Act Claimant would be prejudiced by having the particular dispute settled by arbitration rather than in the Court.

Judge Tuttle characterized the case before him as one particularly suitable for arbitration because it involved the "determination of the amount of money due under a contract" as opposed to the type of case like *Wilko v. Swan*,

supra where legal concepts such as “burden of proof”, “reasonable care”, “material fact” and issues such as the “intent” and “knowledge” of a person were involved. He indicated that he might be more willing to read into the Miller Act an exclusive right to have the claimant’s rights determined in the Federal court if it could be shown that Miller Act disputes involved “complicated and sophisticated legal issues which cannot readily be resolved by Arbitrators untrained in the law”, referring thereby to legal issues of the same genre as were involved in *Wilko v. Swan*, supra.

Judge Rives dissented from Judge Tuttle’s majority opinion primarily on the grounds that, notwithstanding an arbitration provision in a subcontract, government contractors “were restricted in the kinds of agreements into which they might validly enter to those conforming to the public policy declared in the Miller Act”, and the public policy of the United States, as expressed in the *Miller Act*, was and is to give every subcontractor and materialman not reimbursed for work done under a contract “an unqualified right to sue on the payment bond” (Judge Rives quoting from *U.S. ex rel Bryant Electric Co. v. Aetna Casualty & Surety Co.* 297 F.2d 665, 667-CA2, 1962).

A brief comparison of the issues to be arbitrated set forth in Appellees’ Demand for Arbitration, Tr. 15-17, and the Findings and Award of the Arbitrators, Tr. 54-57, should convince the Court that the latter document has little relevancy to the former Demand and that an arbitration panel is not a suitable tribunal for the enforcement of Appellant’s *Miller Act* rights in this instance. An examination of the record might give some indication to the Court how the arbitrators moved from the issues stated in the Demand to the issues resolved in their findings and

award, but we think it best to conclude merely that minds untrained in legal analysis and legal concepts were primarily responsible for the anomalous findings, conclusions and award.

The effort of the arbitrators to reconstitute the subcontract as it perhaps should in their view have been negotiated, may be praiseworthy from the standpoint of technical construction practices, but, if sanctioned by this Court, will certainly not only deprive Appellant of its subcontract rights, but also establish a precedent which will undermine the social and economic value of written contracts and extend the arbitration process into areas not contemplated by those who proposed the *Arbitration Act* to the Congress and as to which it is unsuitable.

It was not the intent of the Arbitration Act to encourage an ineffective or unfair means of resolving contract disputes, nor was it the intent of the *Miller Act* merely to provide a more efficient and rapid means of recovery for the subcontractor and materialmen. Both pieces of legislation must be interpreted to promote reasonable and just results. In *Wilko v. Swan*, supra, the Supreme Court concluded that stockholders' rights under the Securities Act of 1933 could not be entrusted to arbitrators as a matter of public policy and Appellant urges, in this appeal, that a subcontractor's *Miller Act* rights, dependent for their enforcement upon the correct application of rules of law, must as a matter of public policy, be adjudicated by a Court of law.

JURISDICTION OF ARIZONA DISTRICT COURT TO VACATE AWARD

Section 3 of the *Federal Arbitration Act* (9 USC 3) empowers the District Court in which a suit is brought "upon any issue referable to arbitration under an agree-

ment in writing for such arbitration", to stay the trial of the action until arbitration has been had in accordance with the terms of the written agreement. Under this Section the Court must make an initial determination that the issue between the parties is referable to arbitration.

Section 9 of the Arbitration Act (9 USC ' 9) says that if the parties to an arbitration agreement have agreed that a judgment of the Court shall be entered upon the Arbitration award, but do not specify the Court, then any party may make application to the United States District Court in and for the District in which the award is made. The language of this section is that an application "*may be made*" to such District Court, not "shall be made".

Section 10 of the Arbitration Act declares the District Court in and for the District in which "the award was made may make an order vacating the award upon the application of any party to the arbitration" where certain grounds exist. Section 11 of the Arbitration Act uses similar language in empowering such a District Court to modify or correct an arbitration award upon certain grounds.

None of the language used in the foregoing Statutory Sections suggests that jurisdiction conferred therein is exclusive. Admittedly, where there are no other grounds upon which a District Court could obtain jurisdiction for the purpose of enforcing, vacating, correcting or modifying an arbitration award, the only grounds upon which a party to an arbitration could invoke the power of a District Court would be the above statutory provisions, in which instance, such a party would be limited to the Federal District Court in and for the District in which the arbitration award was entered.

But what about the case where the party to an arbitration can invoke a District Court's jurisdiction on other grounds

e.g. where the amount involved is in excess of \$10,000 and the parties are citizens of different states? In *Gaddis Mining Co. v. Continental Materials Corp.*, 196 F. Supp. 860 (D.C. Wyo.—1961) the Wyoming Federal District Court found no difficulty in determining that it had jurisdiction under 28 USC 1332 to entertain an action to enforce an arbitration award which had been entered in Colorado in an arbitration conducted under Colorado law pursuant to a purchase agreement executed in Colorado.

In the instant case, the Arizona District Court had jurisdiction to hear Appellant's claim under the provisions of 40 USC 270 b (b) :

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed, and not elsewhere, irrespective of the amount in controversy in such suit . . ."

Had appellant not sought recovery below upon the bond provided by Appellee Ets-Hokin in compliance with the requirements 40 USC 270 a (a), it could have invoked the jurisdiction of the Federal District Court of Arizona under the provisions of 28 USC 1332, the so-called diversity of citizenship jurisdiction statute.

To the extent that the arbitration award in this case is valid it is also binding upon and enforceable against the bonding company, Appellee Travelers Indemnity Company; and to this extent, such an award would be, in effect, a determination of Appellant's Miller Act rights (40 USC 270), the forum for the proper determination of which rights is exclusively, under the statute creating them in the Arizona Federal District Court. Thus, if it is not necessary to construe Sections 9, 10 and 11 as conferring exclu-

sive jurisdiction upon the District Courts of those Districts in which an arbitration award is made for the purpose of confirming, vacating, modifying or correcting such award, it is not inappropriate or inconsistent to uphold the jurisdiction of other District Courts for the exercise of these powers where that jurisdiction can be invoked upon other statutory ground, as, for example 40 USC 270 or 28 USC 1332.

Except for those cases where the claim arbitrated cannot otherwise qualify for Federal jurisdiction, Sections 9, 10 and 11 of Arbitration Act should be more realistically viewed as venue provisions. Given this perspective in the instant case, the arbitration proceedings and award are really ancillary in character; and since the Arizona District Court has not only the jurisdiction but is the proper court venue wise with respect to the underlying dispute, it should be permitted to retain jurisdiction over the arbitration award. The idea is not radical. Professor Moore in his work on Federal Practice and Procedure (Second Edition), Vol. 1, page 1335 says it is an established rule that:

“Where there are two or more federal grounds and venue is properly laid as to one ground, this venue will support adjudication of the other related ground or grounds”

An illustration of this principle is found in *Ferguson v. Ford Motor Co.* 77 F. Supp. 425 (DCSD NY—1948), an action charging a Sherman Act and Clayton Act violation (wherein proper venue was in the Southern District of New York) and a patent infringement (wherein proper venue as to the Ford Motor Co. was in the Michigan District Court). While the Court found that it could retain jurisdiction over the patent infringement charge because of the Ford Motor Co.'s effective presence in the Southern Dis-

trict of New York through its agents whose acts it controlled, the Court went on to say that even were its jurisdiction doubtful

“... the fact that the first cause of action (the anti-trust claim) will be retained here would lead us to retain jurisdiction for trial over the second (the patent infringement). It should be noted that approximately the same proofs will be made to substantiate each of the two alleged causes of action.”

And Judge Kaufman in *Bradford Novelty Co. v. Mannheim*, 156 F. Supp. 489 (DCSD NY—1957) by way of dictum approved this rule when he said:

“Where the Court is properly vested with one cause of action embodying the principle of fundamental controversy between the parties, the Court may justifiably retain jurisdiction over ancillary or related matters.”

Appellant sees no particular legislative purpose or Congressional policy to be served by requiring the award to be attacked in the instant case in the Federal District Court in and for the Northern District of California, and much common sense in permitting the Court which referred the dispute to arbitration in the first instance to review the award. This is not to argue that the Arizona District Court necessarily has exclusive jurisdiction, but that, at least, it has concurrent jurisdiction which, if invoked first, should prevail.

CONCLUSION

Appellant submits that it has demonstrated in this brief that the District Court in and for the District of Arizona was in error in that:

1. The Appellant should have been permitted to prosecute its claim against Appellees in the District Court pursuant to the rules of law governing civil

actions in such Court, notwithstanding a general congressional policy favoring the Arbitration of disputes arising under agreements containing an arbitration provision.

2. If the Appellant's Miller Act rights were not of overriding concern, then the Arizona District Court should have entertained Appellant's objections to the Arbitration Award.

Respectfully submitted,

RYLEY, CARLOCK & RALSTON

By FRANK C. BROPHY JR.

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK C. BROPHY, JR.

In the
UNITED STATES COURT OF APPEALS
For the NINTH CIRCUIT

UNITED STATES OF AMERICA, For
the Use and Benefit of CHICAGO
BRIDGE & IRON COMPANY, an
Illinois corporation,

Appellant.

vs.

No. 21033

ETS-HOKIN CORPORATION, a
California corporation, and
THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Appellees.

APPELLEES' BRIEF

FILED

MAR 1 1967

WM. B. LUCK, CLERK

FELDMAN, WALDMAN & KLINE
2700 Russ Building
San Francisco
California 94104

LANGERMAN, BEGAM AND LEWIS
1400 Arizona Title Building
Phoenix
Arizona 85003

Attorneys for Appellees

In the
UNITED STATES COURT OF APPEALS
For the NINTH CIRCUIT

UNITED STATES OF AMERICA, For
the Use and Benefit of CHICAGO
BRIDGE & IRON COMPANY, an
Illinois corporation,

Appellant.

vs.

ETS-HOKIN CORPORATION, a
California corporation, and
THE TRAVELERS INDEMNITY COMPANY,
a Connecticut corporation,

Appellees.

No. 21033

APPELLEES' BRIEF

FELDMAN, WALDMAN & KLINE
2700 Russ Building
San Francisco
California 94104

LANGERMAN, BEGAM AND LEWIS
1400 Arizona Title Building
Phoenix
Arizona 85003

Attorneys for Appellees

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	11
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
Statement of Facts	1
Questions Presented	4
SUMMARY OF ARGUMENT	5
ARGUMENT	5
1. CB&I's Notice Of Appeal Dated March 25, 1966, Was Not Timely Filed. Therefore, This Court Lacks Jurisdiction To Hear This Appeal.	5
2. An Agreement To Arbitrate Is Enforceable In Miller Act Cases.	9
3. The District Court Had No Jurisdiction To Hear The Alternate Motion To Vacate Award Under Section 10 Of The United States Arbitration Act.	14
4. The Numerous Assertions In CB&I's Opening Brief Concerning The Arbitration Proceeding And The References To The Transcript Of The Proceeding Constitute A Transparent Attempt By CB&I To Have This Court Review The Decision Of The Arbitrators On The Merits And To Persuade This Court To Substitute Its Judgment For That Of The	

	<u>Page</u>
Arbitrators. This Is Contrary To Law.	16
CONCLUSION	17
CERTIFICATE OF ATTORNEY	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Agostini Bros. Bldg. Corp. v. United States ex rel. Virginia-Carolina Elec. Works, Inc.</u> 142 F.2d 854 (4th Cir. 1944)	10,13
<u>Barnard-Curtiss Co. v. United States ex rel. D. W. Falls Constr. Co.</u> 252 F.2d 94 (10th Cir. 1958)	7,8
<u>Barta v. Oglala Sioux Tribe of Pineridge Reservation</u> 259 F.2d 553 (8th Cir. 1958)	9
<u>Bernhardt v. Polygraphic Co. of America</u> 350 U.S. 198 (1956)	14
<u>Blanchard v. Terry & Wright, Inc.</u> 331 F.2d 467 (6th Cir. 1964)	6
<u>Equitable Sur. Co. v. United States ex rel. W. McMillan & Son</u> 234 U.S. 448, 456 (1914)	8
<u>Ets-Hokin & Galvan, Inc. v. United States ex rel. Albert S. Pratt, Inc.</u> 350 F.2d 871 (9th Cir. 1965)	10,11,13
<u>Griners' & Shaw, Inc. v. Federal Ins. Co.</u> 234 F. Supp. 753 (E.D. S.C. 1964)	6
<u>Hendry Corp. v. American Dredging Co.</u> 318 F.2d 299 (5th Cir. 1963)	6
<u>Lobato v. Pay Less Drug Stores, Inc.</u> 261 F.2d 406, 408 (10th Cir. 1958)	9

Cases

<u>San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.</u> 293 F.2d 796 (9th Cir. 1961)	17
<u>United States Fid. & Guar. Co. v. United States ex rel. Kenyon</u> 204 U.S. 349 (1907)	7
<u>United States ex rel. Air-Con., Inc. v. Al-Con. Dev. Corp.</u> 271 F.2d 904 (4th Cir. 1959)	10,13
<u>United States ex rel. Browne & Bryan Lumber Co. v. Mass. Bonding & Ins. Co.</u> 29 F.R.D. 162 (E.D. N.Y. 1962)	7,8
<u>United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.</u> 364 F.2d 705 (2nd Cir. 1966)	10
<u>United States ex rel. Frank A. Trucco & Sons Co. v. Bregman Constr. Corp.</u> 256 F.2d 851 (7th Cir. 1958)	10,13
<u>United States ex rel. Industrial Eng'r & Fabricators, Inc. v. Eric Elevator Corp.</u> 214 F. Supp. 947 (D. Mass. 1963)	10
<u>United States ex rel. Mutual Metal Mfg. Co. v. Biggs</u> 46 F. Supp. 8 (E.D. Ill. 1942)	7
<u>United States ex rel. Platten v. Bush Constr. Co.</u> 109 F. Supp. 378 (E.D. Mich. 1953)	7
<u>United States ex rel. R. C. Hughes Elec. Co. v. Cook Elec. Co.</u> 217 F. Supp. 647 (E.D. Wash. 1963)	7
<u>United States ex rel. Seaboard Sur. Co. v. Electronic & Missile Facilities, Inc.</u> 206 F. Supp. 790 (D.P.R. 1962)	10,13
<u>Wilko v. Swan</u> 346 U.S. 427, 431-32 (1953)	10,13

Page

Statutes

Rule 73(a), Fed. Rules Civ. Proc.	5,6
9 U.S. Code, section 3	11
9 U.S. Code, section 10	15
40 U.S. Code, section 270a(a)(1)	8
40 U.S. Code, section 270a(a)(2)	8
40 U.S. Code, section 270b(b)	5
40 U.S. Code, former section 270	7

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

22
23
24
25
26

and refused to do the same. Ets-Hokin performed the work and to cover the cost of doing the work withheld from CB&I's progress payments the sum of \$37,077.56.

On or about July 8, 1964, CB&I filed in the United States District Court for the District of Arizona, Prescott Division, action number Civ. 917 Pct. (Tr. pp. 1-5.) In this action, under section 2 of the Miller Act, 40 U.S. Code, section 270b, CB&I sought judgment from Ets-Hokin and Travelers on said Miller Act payment bond in the amount of said sum of \$37,077.56. On August 14, 1964, Ets-Hokin demanded arbitration in accordance with Article 23 of the General Conditions of the subcontract. (Tr. pp. 15-17.) On or about August 20, 1964, Ets-Hokin and Travelers filed their Motion for Stay of Action Pending Arbitration (Tr. pp. 6-7), supported by a Memorandum of Points and Authorities (Tr. pp. 8-10.) and the Affidavit of Robert S. Lauter. (Tr. pp. 18-19.) On or about August 27, 1964, CB&I filed its Response to that Motion for Stay Pending Arbitration. (Tr. pp. 20-26.)

On August 26, 1964, oral argument on the Motion for Stay Pending Arbitration was held before Judge Muecke of the District Court. At the oral argument counsel for appellees stipulated that Travelers would be bound by any award entered by the arbitrators. Judge Muecke granted the motion from the bench at the conclusion of the oral argument. (Tr. p. 27.) CB&I did not appeal from the stay order.

In accordance with the Court's order CB&I selected as

1 its arbitrator Mr. L. A. Elsener and appellees selected Mr.
2 J. P. Murphy. Messrs. Elsener and Murphy selected as the third
3 arbitrator Mr. T. J. Corwin, Jr. The arbitration took place
4 in San Francisco, California, on July 6 and 7, 1965.

5 The arbitrators rendered their award on August 30,
6 1965. The award included an opinion and was signed by two
7 of the three arbitrators--Mr. Corwin and Mr. Murphy. (Tr.
8 pp. 54-57.) A dissent as to "some of the findings stated in
9 the award" was signed by the CB&I arbitrator, Mr. Elsener.
0 (Tr. p. 83.) The arbitrators held that Ets-Hokin was entitled
1 to withhold from CB&I's earnings the sum of \$16,850.45; of the
2 total of \$37,077.56 which had been sought by CB&I, the award
3 directed payment by Ets-Hokin to CB&I of \$20,227.11. Ets-Hokin
4 stands ready to abide by this award and has offered to pay to
5 CB&I the \$20,227.11 awarded to CB&I by the arbitrators, but
6 CB&I has refused this offer.

7 On or about November 24, 1965, CB&I filed its Motion
8 to Vacate Stay Order and Alternate Motion to Vacate the
9 Arbitration Award. (Tr. pp. 28-29.) On January 31, 1966, oral
0 argument on said Motion and Alternate Motion was held before
1 Judge Muecke of the Arizona District Court. Judge Muecke ruled
2 from the bench following oral argument, denying both the Motion
3 and the Alternate Motion. Judge Muecke stated that he was
4 denying the Alternate Motion on the ground that he had no
5 jurisdiction to vacate the award. (Appellant's opening brief,
6 p. 6.) No opinion was written. A minute order, stating that

both motions were denied, was entered. (Tr. p. 69.) It is from that minute order, dated January 31, 1966, that this appeal has been taken by CB&I. CB&I filed its notice of appeal on March 25, 1966. (Tr. p. 180.)

In addition to the motions filed in the Arizona District Court, on or about November 29, 1965, CB&I filed in the United States District Court, Northern District of California, matter number 44430, entitled Application for Order to Set Aside Arbitration Award. On December 20, 1965, Ets-Hokin and Travelers filed their Reply and Memorandum in Opposition to that Application. On December 20, 1965, Ets-Hokin and Travelers also filed in the United States District Court, Northern District of California, matter number 44552, entitled Petition to Confirm Arbitration Award. Oral argument on both matters was held before Judge Zirpoli of that Court on March 30, 1966. (Appellant's opening brief, pp. 5-6.) On December 30, 1966, Judge Zirpoli issued his Order Confirming Award of Arbitrators and denying CB&I's Application for Order to Set Aside Arbitration Award. (See Appendix A, hereto.) Judgment on that Order was signed by Judge Zirpoli on January 11, 1967, and was entered of record on January 16, 1967. (See Appendix B, hereto.) On February 15, 1967, CB&I filed its notice of appeal from that Judgment. (See Appendix C, hereto.)

Questions Presented

1. Was CB&I's notice of appeal dated March 25, 1966

timely?

2. Was the District Court correct in refusing to vacate its stay order?

3. Did the District Court below have jurisdiction to hear CB&I's Alternate Motion to Vacate Arbitration Award?

SUMMARY OF ARGUMENT

1. CB&I's Notice Of Appeal Dated March 25, 1966, Was Not Timely Filed. Therefore, This Court Lacks Jurisdiction To Hear This Appeal.

2. An Agreement To Arbitrate Is Enforceable In Miller Act Cases.

3. The District Court Had No Jurisdiction To Hear The Alternate Motion To Vacate Award Under Section 10 Of The United States Arbitration Act.

4. The Numerous Assertions In CB&I's Opening Brief Concerning The Arbitration Proceeding And The References To The Transcript Of The Proceeding Constitute A Transparent Attempt By CB&I To Have This Court Review The Decision Of The Arbitrators On The Merits And To Persuade This Court To Substitute Its Judgment For That Of The Arbitrators. This Is Contrary To Law.

ARGUMENT

1. CB&I's Notice Of Appeal Dated March 25, 1966, Was Not Timely Filed. Therefore, This Court Lacks Jurisdiction To Hear This Appeal.

Rule 73(a) of the Federal Rules of Civil Procedure

provides that, with certain exceptions, "An appeal permitted by law from a district court to a court of appeals shall be taken by filing a notice of appeal with the District Court within thirty days from the entry of judgment appealed from" In this case, the judgment appealed from the Court's minute order entered January 31, 1966. Thirty days from that date expired on March 2, 1966. CB&I's notice of appeal was not filed in the Court below until March 25, 1966. Therefore, unless CB&I can bring itself within one of the exceptions to the thirty-day rule prescribed by Rule 73(a), its notice of appeal was not timely filed.

The only exception within which CB&I could attempt to bring itself is the one that provides that: "In any action in which the United States . . . is a party, the notice of appeal may be filed by any party within sixty days from such entry." While the action below was filed by CB&I in the name of the United States for the use and benefit of CB&I, the United States is not a true party. In Miller Act cases, the United States is only a nominal party to the action. For example, although the Miller Act states that suit must be brought in the name of the United States (40 U.S. Code, section 270b(b)), this is a mere formality which may be dispensed with. Blanchard v. Terry & Wright, Inc., 331 F.2d 467 (6th Cir. 1964); Hendry Corp. v. American Dredging Co., 318 F.2d 299 (5th Cir. 1963); Griners' & Shaw, Inc. v. Federal Ins. Co., 234 F. Supp. 753 (E.D. S.C. 1964). The contractor-defendant is not allowed

to maintain a third-party complaint against the United States. United States ex rel. R. C. Hughes Elec. Co. v. Cook Elec. Co., 217 F. Supp. 647 (E.D. Wash. 1963). Nor can he counterclaim against the United States. United States ex rel. Mutual Metal Mfg. Co. v. Biggs, 46 F. Supp. 8 (E.D. Ill. 1942). And a Miller Act action abates on the death of the use-plaintiff if there is no timely substitution of a new party plaintiff. United States ex rel. Platten v. Bush Constr. Co., 109 F. Supp. 378 (E.D. Mich. 1953). None of these rules could apply if the United States were truly a party plaintiff.

Two Miller Act cases, wrongly decided as we shall demonstrate, are contrary to the weight of authority. These two are Barnard-Curtiss Co. v. United States ex rel. D. W. Falls Constr. Co., 252 F.2d 94 (10th Cir. 1958), followed by United States ex rel. Browne & Bryan Lumber Co. v. Mass. Bonding & Ins. Co., 29 F.R.D. 162 (E.D. N.Y. 1962). The Barnard-Curtiss case bases its holding entirely on United States Fid. & Guar. Co. v. United States ex rel. Kenyon, 204 U.S. 349 (1907).

The Kenyon case was not a Miller Act case. It dealt with the Heard Act. (40 U.S. Code, former section 270--the predecessor to the Miller Act.) There is an essential difference between a claimant's remedy under the Heard Act and his remedy under the Miller Act. The essential difference lies in the number of bonds and who is protected thereby. Under the Heard Act there was but a single bond given by the prime contractor to the United States to guarantee his performance to

the Government as well as his payment to his subcontractors. Obviously, the United States has a direct and real interest in the disposition of the proceeds of the bond.

However, under the Miller Act there are two bonds, one guaranteeing the contractor's performance to the Government (40 U.S. Code, section 270a(a)(1)), and one guaranteeing the contractor's payment of his subcontractors and materialmen (40 U.S. Code, section 270a(a)(2)). The United States has a direct and real interest in the first bond. Its interest in the second bond is only nominal. It is named on the second bond essentially only because the second bond is required before and as a condition precedent to the execution of the prime contract with the Government. This may be before there are any subcontractors or materialmen. Accordingly, the United States is the obligee on the bond, for the "use and benefit" of any subcontractors or materialmen on the job.

The court in Barnard-Curtiss failed to perceive this essential difference between the Heard Act and the Miller Act. It also disregarded a holding in a Supreme Court case decided subsequent to Kenyon. This later Supreme Court case is Equitable Sur. Co. v. United States ex rel. W. McMillan & Son, 234 U.S. 448, 456 (1914). There the Supreme Court held that with respect to the claim of a subcontractor on a Heard Act bond, the United States was a mere trustee for the benefit of laborers or material men under the Heard Act bond--that is, a nominal party.

As noted above, the Browne & Bryan case relies entirely

on Barnard-Curtiss. This Court should follow the weight of authority. The Browne & Bryan and Barnard-Curtiss cases should be disregarded for the reasons stated above.

Since the United States is not a true party in this action, the exception allowing sixty days rather than thirty days to file a notice of appeal is not applicable. The notice of appeal herein was filed untimely. Timely filing of a notice of appeal is jurisdictional. Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 408 (10th Cir. 1958); Barta v. Oglala Sioux Tribe of Pineridge Reservation, 259 F.2d 553 (8th Cir. 1958). Therefore, this Court is without jurisdiction to hear this appeal. The appeal should be dismissed.

2. An Agreement To Arbitrate Is Enforceable In Miller Act Cases.

The same issue controls both the original motion pursuant to which the stay was granted and the motion to vacate the stay from which this appeal is taken; namely, are agreements to arbitrate future disputes enforceable against Miller Act claimants? CB&I continually confuses that issue with the question of whether particular disputes between the parties to an arbitration agreement are referable to arbitration under that agreement.*/*

*/ If a dispute is referable to arbitration under an agreement, and the other requirements of section 3 of the United States Arbitration Act (9 U.S. Code, section 3) are met, a United States District Court must grant a motion to stay an action brought therein pending arbitration of that dispute.

The enforceability of arbitration agreements has been upheld in many Miller Act cases: United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2nd Cir. 1966); Ets-Hokin & Galvan, Inc. v. United States ex rel. Albert S. Pratt, Inc., 350 F.2d 871 (9th Cir. 1965); Electronic & Missile Facilities, Inc. v. United States ex rel. Moseley, 306 F.2d 554 (5th Cir. 1962), rev'd on other grounds sub nom. Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963); United States ex rel. Air-Con., Inc. v. Al-Con Dev. Corp., 271 F.2d 904 (4th Cir. 1959); United States ex rel. Frank A. Trucco & Sons Co. v. Bregman Constr. Corp., 256 F.2d 851 (7th Cir. 1958); Agostini Bros. Bldg. Corp. v. United States ex rel. Virginia - Carolina Elec. Works, Inc., 142 F.2d 854 (4th Cir. 1944); United States ex rel. Industrial Eng'r & Fabricators, Inc. v. Eric Elevator Corp., 214 F. Supp. 947 (D. Mass. 1963); United States ex rel. Seaboard Sur. Co. v. Electronic & Missile Facilities, Inc., 206 F. Supp. 790 (D.P.R. 1962). See also Wilko v. Swan, 346 U.S. 427, 431-32 (text at note 13) (1953).

In the case of United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., supra, the question of the alleged inconsistency between a Miller Act claimant's right to sue and a defendant's right to enforce an arbitration agreement was put directly to the Court of Appeals for the Second Circuit. The Court, after extensive discussion of the above authorities, held:

"For all of the above reasons we hold the Miller Act contains nothing that in any way prevents the appellees from compelling appellant to arbitrate the dispute between them as he previously had agreed to do." (364 F.2d, at 708.)

In Ets-Hokin & Galvan, Inc. v. United States ex rel. Albert S. Pratt, Inc., supra, the question of the enforceability of arbitration agreements in Miller Act cases was put directly to this Court.*/ This Court vacated the lower Court's order denying a stay, sought under section 3 of the United States Arbitration Act (9 U.S. Code, section 3), and remanded the matter to the District Court for determination of whether Ets-Hokin had waived its right to arbitrate under the agreement, impliedly holding that if Ets-Hokin had not waived its right to arbitrate, a stay should be granted and arbitration should proceed. Thus this Court has in effect, if not in words, determined that arbitration is an appropriate tribunal for determining Miller Act disputes and is thus not inconsistent with the purpose of and remedy provided by the Miller Act.

In Electronic & Missile Facilities, Inc. v. United

*/ The attorneys for Ets-Hokin in the Pratt case are the
attorneys for appellees herein. An examination of pages 6 through 9 of Appellant's Reply Brief in the Pratt case (Tr. p. 179) makes it amply clear that the issue was briefed and argued by both parties.

States ex rel. Moseley, supra, Chief Judge Tuttle's majority opinion convincingly and correctly analyzes the language and the legislative history of the Miller Act and concludes that nothing therein "indicates that Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a federal court. On the other hand, the United States Arbitration Act expressly and unequivocally gave the parties the right to provide for arbitration of all disputes arising under their contracts." (306 F.2d, at 556.) Further, he found that arbitration is not inherently prejudicial to Miller Act claimants and that enforcement of arbitration agreements in such cases is not against public policy.

As indicated by the citation, the Moseley case was reversed on other grounds by the United States Supreme Court. The opinion of the Court, signed by six justices, casts no doubt whatever on the reasoning of Chief Judge Tuttle regarding the question of a possible conflict between the Miller Act and the United States Arbitration Act. CB&I, on pages 21-22 of its opening brief, apparently contends that the concurring opinion of the Chief Justice and Mr. Justice Black constitutes a substantial basis for its argument that arbitration is not available to settle disputes under the Miller Act. While the concurring opinion did state the questions quoted by CB&I on pages 21-22 of its brief, it is significant that six members of the Court who agreed with the Court's disposition of the case

did not sign the Chief Justice's concurring opinion. And Mr. Justice Stewart, in a dissenting opinion, specifically approved Chief Judge Tuttle's opinion. 374 U.S., at 172.

United States ex rel. Seaboard Sur. Co. v. Electronic & Missile Facilities, Inc., supra, also directly holds that an arbitration agreement is enforceable against a Miller Act claimant under the United States Arbitration Act. The other cases cited above, while not directly stating that arbitration agreements are enforceable against Miller Act claimants, certainly imply that that is the case, for if a court believed that the Miller Act gave protected claimants an unwaivable right to litigate, it would not concern itself over whether the judicial requirements of the United States Arbitration Act had been met (Agostini) or the Virginia law of arbitration had been met (Air-Con), or whether the movant had waived his right to arbitrate (Trucco and Pratt). The Supreme Court would certainly not have cited Agostini, a Miller Act case, as an example of the type of case in which arbitration could be particularly useful (Wilko) if it believed that arbitration was inconsistent with the rights of a subcontractor under the Miller Act.

As we have demonstrated, the law clearly upholds the right to enforce an arbitration agreement against a Miller Act claimant.

Since the law on the issue is clear it is a fruitless exercise to inquire, as CB&I does on pages 25-28 of its brief, whether arbitration is against public policy in cases involving

attorneys' fees under the Federal Emergency Price Control Act, a stockholder's derivative action, a proceeding to dissolve a closed corporation, custody of children, or distribution of a decedent's estate.

It also is fruitless to argue, as CB&I does on pages 10-13 of its brief, the question of whether technical or legal issues should be turned over to arbitrators for decision. Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), cited by CB&I at page 12 of its brief, makes it clear that such questions can be and are decided by arbitrators under appropriate arbitration agreements. The passage of the United States Arbitration Act in 1925 put an end to the relevance of academic discussions of whether this question or that was appropriate for submission to the process of arbitration. The test substituted by the Arbitration Act was whether the issue was referable to arbitration under an agreement between the parties. (In passing we suggest to the Court that CB&I's complaint on page 11 of its brief that the issues in this case required the application of legal rather than engineering expertise should not be taken seriously. CB&I had 100% freedom in choosing its arbitrator--and chose a construction man rather than a lawyer.)

3. The District Court Had No Jurisdiction To Hear The Alternate Motion To Vacate Award Under Section 10 Of The United States Arbitration Act.

CB&I based its Alternate Motion to Vacate Arbitration

Award on section 10 of the United States Arbitration Act, 9 U.S. Code, section 10. (Tr. p. 51, line 8.) Yet that section specifically states that it is the United States Court in and for the District wherein the award was made that may make an order vacating the award upon the application of any party to the arbitration. Since the arbitration was held and the award was made in San Francisco, California it is clear that the only Court that has jurisdiction to vacate this award under section 10 of the United States Arbitration Act is the United States District Court for the Northern District of California. CB&I has recognized the jurisdiction of that Court by bringing its Application for Order of the Court to Set Aside Arbitration Award. (See pp. 5-6 of Appellant's brief.)

CB&I attempts to avoid the exclusive jurisdiction provision of section 10 of the United States Arbitration Act by arguing that this provision of section 10 is permissive, not exclusive. CB&I cites no cases for this proposition but relies on the use of the word "may" in the section, instead of the word "shall". CB&I would have the Court hold that section 10 in effect reads:

"In either of the following cases the United States court in and for the district wherein the award was made or in and for any other district which has jurisdiction over the parties may make an order vacating the award . . . "

The added underlined portion would constitute a major and patent deviation from Congress's clear intent to grant jurisdiction, to review the award of a board of arbitrators, only to the court in the district where the arbitration was held. If that intent is to be changed, this Court should leave the change to the Congress. The District Court's denial of its jurisdiction to vacate the award should be affirmed.

4. The Numerous Assertions In CB&I's Opening Brief Concerning The Arbitration Proceeding And The References To The Transcript Of The Proceeding Constitute A Transparent Attempt By CB&I To Have This Court Review The Decision Of The Arbitrators On The Merits And To Persuade This Court To Substitute Its Judgment For That Of The Arbitrators. This Is Contrary To Law.

CB&I has designated as part of the record the transcript of the arbitration proceeding and has made repeated references in its brief as to what went on at that proceeding.

What transpired at the arbitration proceeding is entirely irrelevant to any question properly before this Court. We know that this Court will treat it as such.

It cannot be relevant to CB&I's Motion to Vacate the Stay because CB&I's claim of unfairness in the arbitration proceeding cannot be utilized to support a claim of inherent unfairness. As demonstrated above the courts have already determined that issue. Arbitration is not inherently unfair

1 to a Miller Act claimant.

2 If CB&I had an objection to the arbitration its proper
3 remedy was a motion to vacate or modify the award. CB&I in
4 fact knew that this was the proper remedy because it made such
5 a motion to the California District Court, which motion was
6 denied. However, what transpired at the arbitration proceeding
7 cannot be relevant to CB&I's Alternate Motion to Vacate or
8 Modify the Award in the Arizona District Court, or we respect-
9 fully suggest even considered, because that Court did not have
0 jurisdiction to hear the motion.

1 But even in considering a motion to vacate or modify
2 in a proper Court, the law is clear that the relevance of
3 what transpired at the arbitration proceeding is limited. The
4 District Court could not reverse the decision of the arbitrators
5 on the merits or substitute its judgment for that of the
6 arbitrators. See San Martine Compania de Navegacion, S.A. v.
7 Saguenay Terminals, Ltd., 293 F.2d 796 (9th Cir. 1961).
8 Neither should this Court substitute its judgment for that of
9 the arbitrators.

10 CONCLUSION

11 1. The United States is not a true party in the
12 Miller Act lawsuit below. Therefore CB&I's notice of appeal
13 filed more than thirty days after entry of the order appealed
14 from was untimely and this Court lacks jurisdiction to hear
15 this appeal.

16 2. It would have been manifestly unfair for the

District Court to vacate its October, 1964 Stay Order and to require appellees to litigate this matter after having arbitrated it in reliance on that Stay Order. The unfairness arises from the large extra expense to appellees and from the fact that to vacate the Stay after the arbitration would be giving CB&I an extra procedural advantage to which it is not entitled.

3. Appellees' right to arbitrate their dispute with CB&I is enforceable under the United States Arbitration Act and is not diminished by the fact that CB&I has brought suit under the Miller Act. The order denying the Motion to Vacate the Stay Order should be affirmed.

4. The Arizona District Court had no jurisdiction to vacate the award of the arbitrators under the United States Arbitration Act.

5. What went on at the arbitration proceeding was irrelevant to any matter properly before the District Court, and is irrelevant on this appeal. This Court should refuse CB&I's invitation to reverse the decision of the arbitrators and substitute its own decision therefor.

6. The rulings of the Arizona District Court should be affirmed.

Respectfully submitted,

FELDMAN, WALDMAN & KLINE
LANGERMAN, BEGAM AND LEWIS

Attorneys for Appellees

By Laurence N. Walker
Laurence N. Walker

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

Laurence N. Walker
Laurence N. Walker

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, For the
11 use and benefit of
12 CHICAGO BRIDGE & IRON COMPANY,
an Illinois corporation,

13 Applicant,

14 vs.

No. 44430

15 ETS-HOKIN CORPORATION, a California
16 corporation, and THE TRAVELERS
INDEMNITY COMPANY, a Connecticut
corporation,

17 Respondents.

18
19 In the Matter of the arbitration
20 between ETS-HOKIN CORPORATION, a
California corporation, and THE
21 TRAVELERS INDEMNITY COMPANY, a
Connecticut corporation,

No. 44552

22 Petitioners,

23 and

24 CHICAGO BRIDGE AND IRON COMPANY,
an Illinois corporation,

25 Respondent.
26

27 ORDER CONFIRMING AWARD OF ARBITRATORS

28 The Court has before it the application of CHICAGO BRIDGE
29 & IRON COMPANY for an order setting aside an arbitration
30 award (Civil No. 44430) and the petition of ETS-HOKIN CORPORA-
31 TION to confirm the same award (Civil No. 44552), which have
32 been consolidated and submitted on the record now before the
Court.

1 The jurisdiction of this Court arises under the provi-
2 sions of Sections 1, 2, 10 and 11 of Title 9 U.S.C., and
3 alternatively, under the provisions of Section 1332 of Title
4 28 U.S.C., in that all parties hereto are of diverse citizen-
5 ship and the amount in controversy exceeds \$10,000.

6 Since CHICAGO BRIDGE & IRON COMPANY must carry the bur-
7 den in seeking to set aside the arbitration award, it will
8 hereinafter be referred to as "plaintiff", and ETS-HOKIN
9 CORPORATION will be referred to as "defendant". See American
10 Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.
11 2d. 448, 450 (2 Cir. 1944). The TRAVELERS INDEMNITY COMPANY,
12 the other party to these proceedings, had agreed prior to the
13 arbitration to be bound by any award made by the arbitrators.

14 Defendant entered into a contract with the United States
15 to perform certain construction work at Glen Canyon Dam in
16 Arizona. Defendant subcontracted part of this obligation to
17 plaintiff. During the course of the contract a dispute arose
18 as to the obligation of plaintiff to prestress certain spiral
19 cases in the installation of turbine units. Plaintiff re-
20 fused to perform the prestressing, and the defendant deducted
21 the cost of this work from its payment obligations under the
22 subcontract. Plaintiff thereafter filed a Miller Act (40
23 U.S.C., Section 270a-d) lawsuit in the United States District
24 Court for the District of Arizona. On defendant's motion
25 this action was stayed pending arbitration. The order stay-
26 ing this action provides as follows:

27 It is ordered that defendant's motion for stay
28 of action pending arbitration is granted, only as to
29 specific items raised on the motion, subject to
30 either party coming back to this Court for relief
31 by reason of any delay in such arbitration.

32 The parties submitted their grievances to arbitration
 before a Board, which met in San Francisco. The Board con-
 sisted of three engineers: Mr. J. P. Murphy, selected by

1 defendant; Mr. L. A. Elsener, selected by plaintiff; and
2 Mr. J. T. Corwin, Jr., selected by the first two named.
3 After hearing held on July 6 and 7, 1965, the Board, on
4 August 30, 1965, in a written memorandum signed by two of its
5 members, Murphy and Corwin, Jr., found "that Chicago Bridge
6 & Iron Company should have performed the prestressing of the
7 spiral case" and entered an award directing that defendant
8 pay to plaintiff the sum of \$20,727.11. The total amount
9 sought by plaintiff was \$37,077.56. A written dissent as to
10 "some of the findings stated in the award" was signed and
11 entered by the third arbitrator, Elsener.

12 Plaintiff seeks to set aside the award and contends that
13 in making the award the arbitrators exceeded their "authority"
14 (Section 10 of Title 9 U.S.C. uses the word "powers") by
15 going beyond the issues submitted to them. Plaintiff further
16 contends that "the arbitrators have improperly computed the
17 award based upon available evidence before them." Plaintiff
18 relies on Section 11 of Title 9 U.S.C. for a modification of
19 the award or a remand for such purpose.

20 The pertinent provisions of Section 10 of Title 9 U.S.C.
21 read:

22 In either of the following cases the United
23 States court in and for the district wherein the
24 award was made may make an order vacating the award
upon the application of any party to the arbitration--

25

26 (d) Where the arbitrators exceeded their
27 powers, or so imperfectly executed them that a
28 mutual, final and definite award upon the subject
matter submitted was not made. [Emphasis added]

29 Section 11 of Title 9 U.S.C. in its pertinent pro-
30 visions reads:

31 In either of the following cases the United
32 States court . . . may make an order modifying or

1 correcting the award upon application of any
2 party to the arbitration--

3 (a) Where there was an evident material mis-
4 calculation of figures or an evident material mis-
5 take in the description of any person, thing or
6 property referred to in the award.

7

8 The order may modify and correct the award,
9 so as to effect the intent thereof and promote
10 justice between the parties.

11 Whether the arbitrators exceeded their "powers" depends
12 upon the issues which were submitted to them for decision.
13 Normally, the issues submitted for arbitration are clearly
14 defined in a formal agreement between the parties. Unfor-
15 tunately, in this case no such formal agreement is included
16 in the record. The record, which the Court must examine to
17 determine the issues presented for decision of the arbitrators,
18 consists of:

19 (a) The subcontract between the plaintiff and defendant
20 and, in particular, the provisions of paragraphs 1, under
21 the title "Work to be Performed" ^{1/} and 23, under the title
22 "Arbitration"; ^{2/}

23 (b) The letter from plaintiff to defendant dated
24 August 15, 1962, setting forth plaintiff's understanding of
25 the terms of the contract to be incorporated in (a) above;

26 ^{1/} The subcontract under paragraph I. WORK TO BE PERFORMED
27 recites in part: "Subcontractor agrees to furnish all labor,
28 to furnish, supply and install all equipment, materials and
29 supplies, . . . , as more specifically set forth in Section 16
30 of the General Conditions of this Subcontract, and to do any
31 and all things required to perform all that portion of the
32 work provided for in the General Contract which is described
as follows: . . . (b) A portion of Item 79 of Bidding Schedule
for Spec. No. DC-5750 described as the installation, assembly
and welding of the upper and lower draft tube liners with pier
noses and pit liners as well as the installation of the dis-
charge ring, stay ring and spiral cases with test barrel and
spider. The above described work shall include but not neces-
sarily be limited to the following as per Spec. No. DC-5750."
Then follows a list of the included items and a list of items
that the Contractor shall furnish to the Subcontractor, fol-
lowed by a further proviso that "It is understood that this

1 (c) The formal demand of defendant for arbitration
2 dated August 14, 1964, submitted at the time it moved to
3 stay the proceedings in the Miller Act case in Arizona;

4 (d) The order of the District Court in Arizona staying
5 the Miller Act proceedings;

6 (e) Answers to questions propounded by the neutral
7 arbitrator, Corwin, Jr.;

8 (f) Supplementary statements of issues and contentions
9 (argumentative in character) filed by each party with the
10 arbitrators;

11 (g) Written briefs filed with the arbitrators both
12 before and after the arbitration proceedings;

13 (h) The memorandum and award made and entered by the
14 majority of the arbitrators;

15 (i) The written dissent of arbitrator Elsener; and

16 (j) The transcript of the proceedings before the
17 Arbitration Board.

18 Plaintiff takes the position that the arbitrators were
19 not empowered to look beyond the four corners of the sub-
20 contract, (a) above, and the demand of defendant, (c) above,
21 which demand plaintiff contends formed the basis of the stay
22 order of the District Court in Arizona.
23

24 contract does not include work described as follows:"
25 The excluded work is then described. Nowhere in the sub-
26 contract, either in the included or excluded work, is there
any specific reference to prestressing spiral cases.

27 2/ Paragraph 23 under the General Conditions of the Sub-
28 contract provides: "Arbitration: In case of any dispute
29 between the parties as to the interpretation of this agree-
30 ment, . . . or with respect to any other matter arising out
of or in connection with this Subcontract or its performance,
either party may demand that the dispute be submitted to
arbitration. . . ."

1 Before considering the merit of plaintiff's position,
2 it should be noted that the arbitrators' authority was not
3 limited by the order of the Arizona District Court. The
4 remedy sought by the defendant in the Arizona District Court
5 was merely the staying of the Miller Act lawsuit under Section
6 3 of Title 9 U.S.C. The Court's order did not direct the
7 parties to arbitrate. It merely stayed the lawsuit pending
8 arbitration in accordance with the agreement of the parties.
9 Thus, the arbitrators derived their authority not from the
10 order of the Court, but from the arbitration agreement,
11 Article 23 of the General Conditions of the Subcontract, as
12 specified by the demand for arbitration and the later state-
13 ments and briefs of the parties defining the issues for
14 arbitration. American Almond Products Co. v. Consolidated
15 Pecan Sales Co., supra.

16 On the merits, this Court is of the view that the Board
17 was not limited in its powers to the subcontract and the
18 first demand of defendant for arbitration made on August 14,
19 1964. The items of record listed above as (d) through (j)
20 show that the parties did not limit the issues to the sub-
21 contract and the demand of August 14, 1964, and, furthermore,
22 that the Board felt it was necessary to resort to extrinsic
23 evidence to clear up an ambiguity which arose in its effort
24 to determine what work was intended and understood by the
25 parties to be the work described in the subcontract as "a
26 portion of Item 79 of Bidding Schedule for Spec. No. DC-5750
27 described as the installation, assembly and welding of the
28 upper and lower draft tube liners with pier noses and pit
29 liners as well as the installation of the discharge ring,
30 stay ring and spiral cases with test barrel and spider."

31 The demand of August 14, 1964 was broadened by the
32 parties in their preliminary statements of the issues which

1 were submitted to the arbitrators prior to the hearing.

2 Defendant states the issues in part as: "(a) Whether
3 by intention and understanding of the parties or express
4 contract language or both, the prestressing of the spiral
5 cases was part of Chicago Bridge & Iron's subcontract."
6 [Emphasis added].

7 Plaintiff states the issues in part as: "The sub-
8 contract was clearly intended and understood by the parties
9 to be the work under item 79 which was preliminary to CB & I
10 subcontract work for the turbine manufacturer"
11 [Emphasis added].

12 In the course of the hearing counsel for plaintiff
13 clearly stated the broadened issue as follows: "MR. BROPHY:
14 I think what is before the Board is what the parties did after
15 the agreement, and what they did before the agreement, for
16 the purpose of the Board's making up its mind what the agree-
17 ment meant at the time that it was executed (p. 93, Transcript
18 of Arbitration Proceedings).

19 Thus, both plaintiff and defendant included and under-
20 stood to be included among the issues to be discussed and
21 determined by the arbitrators the intention and understanding
22 of the parties, which clearly goes beyond the question of the
23 inclusion or not of a specific written covenant in the sub-
24 contract. While the memorandum opinion and award of the
25 majority of the Board may not be a model for clarity, findings
26 8 and 11 ^{3/} of the majority opinion can be fairly construed

27
28 ^{3/} Findings 8 and 11 of the majority opinion of the Board
29 provide:

30 8. That the oral offering of furnishing a
31 stand-by operator by a responsible representative
32 of Chicago Bridge and Iron Company to secure a con-
tract should be as binding as the written word, as
no evidence was presented of a written acceptance
or refusal of this offer.

1 to hold that the parties intended and understood that
2 plaintiff agreed to and was to do the prestressing work and
3 finding 12 ^{4/} can be fairly construed to state that the work
4 of prestressing was not an express written covenant of the
5 contract. This understanding of findings 8, 11 and 12 is
6 confirmed in the penultimate paragraph of arbitrator Elsener's
7 dissent, wherein he states:

8 Even if Chicago Bridge should be backcharged,
9 the finding that overtime should be included is in-
10 correct. Either Chicago Bridge agreed to do the
11 prestressing work or it did not. The majority of
12 this Board says it did. The terms of the contract
13 between Chicago Bridge and Ets-Hokin specifically
14 excluded any responsibility of Chicago Bridge for
15 premium pay for work Chicago Bridge agreed to do.
16 [Emphasis added].

17 A further indication of the broadened scope of the
18 issues presented to the Board and understood by the members
19 of the Board to be within their province in the list of
20 twenty-one questions submitted by arbitrator Corwin, Jr., to
21 the parties relating to the subcontract, the performance of
22 the work and the negotiations between the parties. Question
23 No. 19(a) asked, "Was there any discussion between contractor
24 and subcontractor about who would perform the prestressing
25 work?". Both parties answered this question. Plaintiff
26 raised no objection to the question as being beyond the
27 scope of the submission, as plaintiff now contends.

28 11. That Chicago Bridge and Iron Company
29 should have performed the prestressing of the
30 spiral case and the Ets-Hokin Corporation should
31 have performed the cooling of the concrete sur-
32 rounding the spiral case.

33 4/ Finding 12 of the majority opinion of the Board provides:

34 12. That the Chicago Bridge and Iron Company's
35 claim that if responsible, they should not be
36 charged overtime rates, this must be denied as
37 Exhibit 83, pp. C-9, covers work which Chicago
38 Bridge and Iron Company agrees to perform, etc.
39 Evidence indicates they did not agree to perform
40 the prestressing work.

1 This Court finds that though there is no specific
2 mention in the subcontract of an obligation on the part of
3 plaintiff to do the prestressing work, the arbitrators in the
4 determination of this issue were not limited to the four cor-
5 ners of the subcontract, but were empowered by reason of the
6 supplementation and broadening of the issues presented to
7 them to resort to extrinsic evidence to determine whether
8 the parties intended and understood that plaintiff would do
9 the prestressing work. The award was within the terms of
10 the submission and regardless of the degree to which the
11 views of the arbitrators on the facts and the law may be
12 open to question, such award "will not be set aside by a
13 court for errors either in law or fact." See San Martine
14 Compania De Navegacion, S.A. v. Saguenay Terminals Ltd.,
15 293 F. 2d 796, 800-802 (9th Cir. 1961).

16 Plaintiff has not sustained its burden, and there is
17 no basis for the Court to determine that the award was beyond
18 the submission or that the award contains anything but the
19 honest decision of the arbitrators after a full and fair
20 hearing of the parties. This Court will not substitute its
21 judgment for that of the arbitrators.

22 The Court further adds that even if it be conceded
23 that a comparison of paragraphs 8, 11 and 12 of the majority
24 opinion accompanying the award leads one to conclude that
25 the award was ambiguous, this is not a ground for the Court
26 to set aside the award. United Steel Workers of America v.
27 Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960).

28 The foregoing findings and conclusions have been based
29 entirely on federal law. If the Court should treat the appli-
30 cation herein as one to vacate or correct the award under
31 California law, it must come to the same conclusion reached
32 above. California law is the same as federal law insofar as

1 grounds for vacating or correcting the award are concerned.
2 California Code of Civil Procedure, Section 1286.2. The
3 decision of the arbitrators is final both as to questions of
4 fact and of law. Sapp v. Barenfeld, 34 Cal. 2d 515 (1949).
5 Every intendment of validity must be given the award.
6 Griffith Co. v. San Diego College for Women, 45 Cal. 2d 501,
7 516 (1955).

8 The record will not sustain plaintiff's second conten-
9 tion that the arbitrators improperly computed the award.
10 While there may have been "available evidence before them"
11 from which a correction of a claimed miscalculation of back-
12 charges could have been made to plaintiff's benefit in the
13 sum of \$2,662.08 or \$1,305.93 or some other sum, the fact
14 remains that this available proof was never submitted to the
15 arbitrators in any verified form. Although there was dis-
16 cussion at the hearing relative to the reconciling of any
17 claimed differences, this was not done. See page 289 of the
18 Transcript of the Arbitration Proceedings. Under the cir-
19 cumstances, the award must be accepted as final, and this
20 Court will not speculate as to what corrections, if any,
21 might have been made.

22 The application to set aside the award and to substitute
23 a different award in its place is denied. The petition to
24 confirm the award is granted.

25 This opinion shall constitute the findings of fact and
26 conclusions of law of the Court, and based thereon defendant
27 is directed to submit an appropriate judgment to the Court.

28 Dated: December 30, 1966

29
30 ALFONSO J. ZIRPOLI
31 United States District Judge
32

United States District Court

Northern District of California

Division

U.S.A. FOR THE USE & BENEFIT OF CHICAGO BRIDGE &
IRON CO. ETC

VS

ETS-HOKIN CORP. ET AL

AND

vs.

IN THE MATTER OF THE ARBITRATION BETWEEN ETS-
HOKIN CORP. ET AL

VS

CHICAGO BRIDGE & IRON CO. ETC

Civ. Nos. 44430 & 44552

NOTICE

TO
PILLSBURY, MADISON & SUTRO
STANDARD OIL BLDG. SAN FRANCISCO, CALIF.

RILEY, CARLOCK & RALSTON
TITLE & TRUST BLDG. PHOENIX, ARIZONA

FELDMAN, WALDMAN & KLINE
2700 RUSS BLDG. SAN FRANCISCO, CALIF.

YOU ARE HEREBY NOTIFIED that on JANUARY 16, 1967
a DECREE JUDGMENT was entered of record in this office in the above entitled case.
UPON THE ORDER CONFIRMING AWARD OF ARBITRATORS

~~YOU ARE HEREBY NOTIFIED~~

~~a NOTICE OF APPEAL~~

~~in the above entitled case. A copy which is enclosed herewith~~

JAMES P. WELSH
CLERK, U. S. DISTRICT COURT
D.T.C.

SAN FRANCISCO,
CALIFORNIA

JANUARY 16, 19 67

1 FELLMAN, WALDMAN & KLINE
2 2700 Russ Building
3 San Francisco, California 94104
4 Telephone: 961-1300
5
6
7

8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA, For the
12 use and benefit of
13 CHICAGO BRIDGE & IRON COMPANY, an
14 Illinois corporation,

15 Applicant,

16 vs.

NO. 44430

17 ETS-HOKIN CORPORATION, a California
18 corporation, and THE TRAVELERS
19 INDEMNITY COMPANY, a Connecticut
20 corporation,

21 Respondents.

22 In the matter of the arbitration
23 between ETS-HOKIN CORPORATION, a
24 California corporation and THE
25 TRAVELERS INDEMNITY COMPANY, a
26 Connecticut corporation,

27 Petitioners,

NO. 44552

28 and

29 CHICAGO BRIDGE AND IRON COMPANY,
30 an Illinois corporation,

31 Respondent.
32

33 JUDGMENT UPON ORDER CONFIRMING AWARD OF ARBITRATORS

34 These consolidated proceedings came on regularly for
35 hearing on March 30, 1966, in the above-entitled Court, the
36 Honorable Alfonso J. Tirpoli, Judge, presiding, applicant and
37 respondent Chicago Bridge & Iron Company appearing by attorneys

1 Frank N. Brophy, Jr., and G. H. Lockhardt and respondents an
2 petitioners Ets-Hokin Corporation and The Travelers Indemnity
3 Company appearing by attorneys Leo E. Borregard and Laurence
4 Walker; and written memoranda having been presented by all
5 parties; and the cause having been argued and submitted for
6 decision; and the Court having made and caused to be filed herein
7 its written findings of fact and conclusions of law; and the
8 Court having ordered on December 30, 1966, that the Petition of
9 Ets-Hokin Corporation and The Travelers Indemnity Company to
10 confirm an arbitration award dated August 30, 1965, in favor of
11 Chicago Bridge & Iron Company and against Ets-Hokin Corporation
12 in the sum of \$20,227.11, be granted, and that the application
13 of Chicago Bridge & Iron Company to set aside said award and to
14 substitute in its place an award in its favor in the amount of
15 \$37,077.56, plus interest, be denied, and a judgment be
16 entered thereon; and the aforesaid arbitration award having been
17 duly filed herein;

18 It is ORDERED, ADJUDGED, AND DECREED that:

19 1. Chicago Bridge & Iron Company recover of and from
20 Ets-Hokin Corporation and The Travelers Indemnity Company the
21 sum of \$20,227.11, and

22 2. Ets-Hokin Corporation and The Travelers Indemnity
23 Company recover from Chicago Bridge & Iron Company their costs
24 in these consolidated proceedings.

25 Dated: January 9, 1967.

26
27
28 MICHAEL J. ZIRPOLI

29 Approved as to form.

United States District Judge

30 RILEY, CARLOCK & RALSTON

31
32 By Frank N. Brophy

Dated: Jan 9, 1967

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SOUTHERN DIVISION

ORIGINAL
FILED

FEB 10 1967

CLERK, U. S. DIST. COURT
SAN FRANCISCO

4 UNITED STATES OF AMERICA, For the)
5 use and benefit of)
6 CHICAGO BRIDGE & IRON COMPANY, an)
7 Illinois corporation,)

8 Applicant,)

9 vs.)

10 ETS-HOKIN CORPORATION, a California)
11 corporation, and THE TRAVELERS)
12 INDEMNITY COMPANY, a Connecticut)
13 corporation,)

14 Respondents.)

15 In the matter of the arbitration)
16 between ETS-HOKIN CORPORATION, a)
17 California corporation and THE)
18 TRAVELERS INDEMNITY COMPANY, a)
19 Connecticut corporation,)

20 Petitioners,)

21 and)

22 CHICAGO BRIDGE AND IRON COMPANY,)
23 an Illinois corporation,)

24 Respondent.)

NO. 44430

NO. 44552 ✓

25 NOTICE OF APPEAL

26 Notice is hereby given that the CHICAGO BRIDGE AND IRON
27 COMPANY, Respondent above-named, hereby appeals to the U. S. Court
28 of Appeals for the Ninth Circuit from the Judgment of the District
29 Court entered upon the Order of said Court in this action on the
30 16th day of January, 1967 denying the application of CHICAGO BRIDGE
31 AND IRON COMPANY to set aside an Arbitration Award of August 30,
32 1965 and granting the Petition of the ETS-HOKIN CORPORATION and
THE TRAVELERS INDEMNITY COMPANY for an Order confirming an Arbitration Award dated August 30, 1965.

DATED: This 10th day of February, 1967.

1 RYLEY, CARLOCK & RALSTON

2
3 by 15/ Frank C. Brophy, Jr.

4 Attorneys for Respondent
5 Chicago Bridge & Iron Company

6 Copy of the foregoing Notice
7 mailed this 15th day of February,
8 1967 to:

9 Feldman, Waldman & Kline
10 2700 Russ Building
11 San Francisco, California 94104

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
15/ Frank C. Brophy, Jr.

No. 21033

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, For the Use
and Benefit of CHICAGO BRIDGE & IRON
COMPANY, an Illinois corporation,

Appellant,

VS.

ETS-HOKIN CORPORATION, a California cor-
poration, and THE TRAVELERS INDEMNITY
COMPANY, a Connecticut corporation,

Appellees.

On Appeal from the United States District Court
for the District of Arizona

Appellant's Reply Brief

RYLEY, CARLOCK & RALSTON
FRANK C. BROPHY, JR.

Title and Trust Building
Phoenix, Arizona 85003

Attorneys for Appellant

FILED

APR 21 1967

WM. B. LUCK, CLERK

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

APR 26 1967

SUBJECT INDEX

	Page
I. The United States Is a Party to the Action in the Lower Court for Purposes of Perfecting an Appeal Under Rule 73(a)(1) of the Federal Rules of Civil Procedure.....	1
II. CB&I's Use of the Record in the Arbitration Proceedings to Demonstrate Its "Inherently Unfair" Argument Is Not an Attempt to Have This Court Review the Decision of the Arbitrators	7

TABLE OF AUTHORITIES CITED

CASES	Pages
Barnard-Curtiss Company v. United States ex rel D. W. Falls Constr. Co., 252 F.2d 94 (10th Cir. 1958).....	2, 6
Equitable Surety Co. v. United States to Use of W. McMillan & Son, 234 US 448 (1914).....	2, 3, 4, 6
United States Fidelity & Guaranty Co. v. United States for Benefit of Kenyon, 204 US 349 (1907).....	4, 5
United States v. American Society of Composers, Authors & Publishers, 331 F.2d 117, (CA 2d-1964) cert. den. 377 US 997 (1964)	6
Wilko v. Swan, 346 U.S. 427 (1953).....	7

STATUTES

Federal Arbitration Act, 9 U.S.C., Section 3, et seq.....	7, 8
Federal Rules of Civil Procedure, Rule 73(a).....	1, 2, 3, 4
Judiciary Acts of 1887, 1888 (24 Stat. at Large, 552, Chap. 373; 25 Stat. at Large, Chap. 866).....	4
Miller Act, 40 U.S.C. Section 270, et seq.....	2, 4, 5, 6, 7

TEXT

Moore's Federal Practice, 2nd Edition, Vol. 7, Page 3163....	6
--	---

No. 21,033

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, For the Use
and Benefit of CHICAGO BRIDGE & IRON
COMPANY, an Illinois corporation,

Appellant,

VS.

ETS-HOKIN CORPORATION, a California cor-
poration, and THE TRAVELERS INDEMNITY
COMPANY, a Connecticut corporation,

Appellees.

On Appeal from the United States District Court
for the District of Arizona

Appellant's Reply Brief

I

**THE UNITED STATES IS A PARTY TO THE ACTION IN THE
LOWER COURT FOR PURPOSES OF PERFECTING AN AP-
PEAL UNDER RULE 73(d)(1) OF THE FEDERAL RULES OF
CIVIL PROCEDURE.**

Appellees contend that this Court lacks jurisdiction because Appellant's Notice of Appeal dated March 25, 1966 was not timely filed (Appellee's Brief P. 5); and that it was

not timely filed because Appellant cannot avail itself of the exemption provided by Rule 73(a) of the Federal Rules of Civil Procedure, which provides for a sixty day filing period in any action "in which the United States . . . is a party." According to Appellees, the United States is not a "true party" (Appellee's Brief P. 6) to the lower court proceeding and, therefore, Appellant's rights are governed by the thirty day filing period prescribed by the Rule 73(a).

There being no other authority directly on point, Appellant relied at the time and continues to rely upon the two cases cited by Appellees as authority for the proposition that Appellants are entitled to claim the exemption above-described.

The Court in *Barnard-Curtiss Company v. United States ex rel D. W. Falls Constr. Co.*, 252 F.2d 94 (10th Cir. 1958) noted several of the arguments advanced by Appellees herein, but was not persuaded that the United States did not have a genuine interest in affording bond protection for materialmen and subcontractors on Federal projects. Contrary to Appellees' interpretation, the Court in *Barnard-Curtiss Company* did not ignore the Supreme Court's holding in *Equitable Surety Co. v. United States to Use of W. McMillan & Son*, 234 US 448, 456 (1914), but gave it thoughtful consideration and concluded that the holding in that case did not require it to decide that the United States was not a party to the action for purposes of Rule 73(a). In fact, the *Barnard-Curtiss Company* Court cited the *Equitable Surety Co.* case, *supra*, for the proposition that the Government is a party who has a real interest or concern for the protection of the rights of the materialman and laborer under the *Miller Act's* predecessors. It quoted with approval the following language from the *Equitable Surety Co.* case, *supra*:

“The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic’s lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that claims will be paid.”

Appellees cite the *Equitable Surety Co.* case, *supra*, for the proposition that the United States is merely a trustee for the materialmen and laborers; therefore, merely a nominal party; therefore, not a true party to the action under Rule 73(a).

In the *Equitable Surety Co.* case, the surety was arguing for its release on the bond upon the grounds that the *Government*, as an obligee under the bond, and the contractor, as a principal, had made changes in a construction contract without the surety’s knowledge, although such changes did not alter the general character of the work contemplated by the contract. While admitting the rule that any agreement altering the undertaking of the principal must be participated in by the obligee before it has the effect of discharging the surety, nevertheless, the court felt that since the Government was an obligee, in name only, with respect to the rights of materialmen and laborers, and that the latter could in no manner control the conduct of the Government as nominal obligee, the general principles of equity would not permit the Government to barter away the rights of the true beneficiaries of bonds, i.e. the materialmen and laborers. To permit such a construction under the circumstances, said the Court, would “defeat the principal object that Congress had in view in enacting the statute.”

Thus, the Supreme Court adopted its view of the government's rule as Trustee in the *Equitable Surety Co.* case, supra, for the purpose of protecting the rights of the claimants under the bond and not for the purpose of defeating them. Recognizing this, the 10th Circuit gave short shrift to the idea that a *Miller Act* claimant's rights could be brusquely terminated on the grounds that the United States was not a "true party" to the lower court action for the purposes of Rule 73(a).

Unlike the late *Equitable Surety Co.* case, supra, the Supreme Court in *United States Fidelity & Guaranty Co. v. United States for Benefit of Kenyon*, 204 US 349, 357, 358, (1907), was faced with the question of whether the then United States Circuit Court under the *Judiciary Acts of 1887, 1888* (24 Stat. at Large, 552, Chap. 373; 25 Stat. at Large, Chap. 866), had jurisdiction to hear the case. Those Acts limited the court's jurisdiction to disputes of a value of \$2,000 or less, unless the United States was a plaintiff in the action. The bonding company contended that the United States was a nominal party only and, therefore, jurisdiction would not lie. The Supreme Court found that for purposes of construing the *Judiciary Acts of 1887 and 1888*, the Government was a real party in interest, and not merely a nominal party. The Supreme Court in justifying its opinion cited those very elements of the *Miller Act's* predecessor which are today found in the *Miller Act* (40 USC 270), namely the statutory provisions calling for a bond guaranteeing prompt payment of materialmen and laborers. To quote the Court:

"In a large sense the suit has for its main object to enforce that provision in the bond that requires prompt payments by the contractor to material men and laborers. The bond is not simply one to secure the faithful

performance by the contractor of the duties he owes directly to the government in relation to the specific work undertaken by him. It contains, as just stated, a special stipulation with the United States that the contractor shall promptly make payments to all persons supplying labor and materials in the prosecution of the work specified in his contract. This part of the bond, as did its main provisions, ran to the United States, and was heretofore enforceable by suit in its name. We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is, therefore, a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. We are of opinion, in view of the peculiar language of the act of 1894 for the protection as well of the United States as of all persons furnishing materials and labor for the construction of public works, that it is not an unreasonable construction of the words in the judiciary act of 1887, 1888, 'or in which controversy the United States are plaintiffs or petitioners,' to hold that the United States is a real, and not a mere nominal, plaintiff in the present action, and therefore that the circuit court had jurisdiction."

On the basis of the above cited Supreme Court cases, one might conclude as to the rights of materialmen and laborers (or subcontractors) under Miller Act type legislation that the Supreme Court has generally favored that interpretation of a statute or rule of law (a jurisdictional statute in the *Kenyon* case and a law of suretyship in the

Equitable Surety Co. case which advances or protects such rights. Thus, the Court in the *Barnard-Curtiss Company* case, *supra*, cannot be said to have failed to perceive any essential difference between the *Miller Act* and its predecessors.

According to Professor Moore, (Moore's Federal Practice, 2nd Edition, Vol. 7, Page 3163), the view that the thirty rather than the sixty day period applies if the Government was merely a formal or nominal party to the action in the District Court, "introduces an element of uncertainty in the very critical, because jurisdictional, area, of the time for appeal." He recommends against it finding favor and cites Judge Friendly's rejection of the test of the Government's interest in the case as equally conclusive against any except a quite literal reading of the phrase "any action in which the United States . . . is a party."

"It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. Section 2107 of Title 28 and F. R. Civ Proc. 73(a) unequivocally allow 'to all parties' 60 days to appeal in any action 'in which the United States or an officer or agency thereof is a party.' The stated criterion is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined when the order is made."

United States v. American Society of Composers, Authors & Publishers, 331 F.2d 117, (CA 2d-1964)
cert. den. 377 US 997 (1964)

CB&I'S USE OF THE RECORD IN THE ARBITRATION PROCEEDINGS TO DEMONSTRATE ITS "INHERENTLY UNFAIR" ARGUMENT IS NOT AN ATTEMPT TO HAVE THIS COURT REVIEW THE DECISION OF THE ARBITRATORS.

After having examined the Supreme Court's reasoning in *Wilko v. Swan*, 346 U.S. 427 (1953), it takes an aggressive mind to characterize an effort made to sustain the proposition set forth therein as to those circumstances which will warrant a public policy decision against application of the *Federal Arbitration Act*, as a transparent attempt to have this Court review the decision of the arbitrators.

It is difficult to demonstrate *in vacuo* the unfairness of the arbitration proceedings to the Appellant's legal rights. The record of the proceedings puts meat on the bones of the argument, so to speak.

This Court must first decide if Appellant has something specifically referred to as "Miller Act rights" and then it must decide if those rights conflict in certain instances with the rights supported by the *Federal Arbitration Act*, 9 U.S. Code, Section 3, et seq. If it then finds that the enforcement of the Arbitration Act under the circumstances of this case has the effect of denying to Appellant its rights under the *Miller Act*, then it must decide the question of which Federal Act has the paramount policy. The Supreme Court in *Wilko v. Swan*, supra, decided that with respect to a conflict between a private claimant's rights under the *Securities Act of 1933* and the right of a defendant under the *Federal Arbitration Act*, the *Securities Act* would prevail on grounds of a paramount public policy. Appellant herein seeks only to elicit a similar conclusion from this Court, and in advancing its argument to this end has deemed it appropriate, for illustration purposes only, to refer this Court to the Arbitration proceedings in this litigation.

Appellees argue that if Appellant is unhappy with the Arbitration proceedings and award, it should appeal the award on the grounds specified in the *Federal Arbitration Act*. As already noted, the areas of appeal under the Arbitration Act are extremely limited (See Appellant's Opening Brief, pp. 13 & 14), and there is no judicial review of legal issues not otherwise found in Sections 10 and 11 of the *Federal Arbitration Act*.

Appellees have noted in their brief the proceedings in the United States District Court, Northern District of California (Appellees Answering Brief p. 4, and Appendix A, B, & C thereto), and this Court should be aware that, in taking all steps to protect whatever rights the law allows to them, Appellant has sought judicial review of the arbitration award upon such specified statutory grounds as were available and has now appealed to this Court from an adverse judgment entered upon such review. It would be appropriate, in Appellant's view, for the appeal from the United States District Court for the Northern District of California to be consolidated with this appeal, so that those portions of the record common to both appeals need not be duplicated and the Court may consider at one time all matters now pending, pertaining to the validity of the arbitration proceedings. Appellant will move for such consolidation of appeals shortly.

Respectfully submitted,

RYLEY, CARLOCK & RALSTON

By FRANK C. BROPHY, JR.

Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK C. BROPHY, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Nos. 21044-5-6 ✓

Appeal From the United States District Court
For the Southern District of California

APPELLANTS' OPENING BRIEF

FILED

JAN 16 1967

M. E. LUCK, CLERK

SHEELA, O'LAUGHLIN, HUGHES & CASTRO
By: Barton C. Sheela, Jr. and
Ramon Castro
Suite 1101 U. S. Grant Hotel
San Diego, California 92101

(714) 233-8858

Attorneys for Appellants

INDEX

Page

TABLE OF AUTHORITIES	1 - iii
I. STATEMENT OF JURISDICTION.	1a
II. STATEMENT OF THE CASE.	2a
III. SPECIFICATION OF ERRORS.	5a
IV. STATEMENT OF FACTS.	1
A. Evidence at Trial Before the Jury.	1
1. Evidence Concerning all the Appellants.	1
2. Evidence as to Santos only.	4
3. Evidence as to Lamenca only.	5
B. Matters and Evidence Presented Outside the Hearing of the Jury.	3
1. Objections to Statements of Appellants.	6
2. Revealing the Identity of the Informant.	7
3. Motion for Mistrial.	11
V. ARGUMENT.	13
A. SUBSTANTIAL PREJUDICE RESULTED TO ALL APPELLANTS ON THE TRIAL COURT'S REFUSAL TO REQUIRE IDENTIFICATION OF THE INFORMANT.	13
B. APPELLANTS WERE PREJUDICED BY THE ADMISSION OF THEIR STATEMENTS WHERE SUCH STATEMENTS WERE OBTAINED WITHOUT A SHOWING OF AN INTELLIGENT WAIVER OF COUNSEL.	18
C. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION OF APPELLANT LAMENCA.	20

1 D. THE EVIDENCE IS INSUFFICIENT AS A MATTER
2 OF LAW TO SUSTAIN THE CONVICTION OF
3 APPELLANT SANTOS.

23

4 VI. CONCLUSION.

24

5 CERTIFICATE.

25

TABLE OF AUTHORITIES

Page

CASES

Ali Ming Cheng v. United States, 300 F.2d 202 (5th Cir., 1962).	22
Alexander v. United States, 362 F.2d 379 (9th Cir., 1966).	15
Cook v. United States, 354 F.2d 529 (9th Cir., 1965).	15
Crooker v. California, 357 U. S. 433.	19
Diaz-Rosendo v. United States, 364 F.2d 941 (9th Cir., 1966).	21
Escobedo v. Illinois, 378 U.S. 478.	19
Evans v. United States, 247 F.2d 121, 126 (9th Cir., 1958).	22
Garibay-Garcia v. United States, 262 F.2d 509 (9th Cir., 1966).	15
Hurst v. United States, 344 F.2d 327 (9th Cir., 1965).	15
Massiah v. United States, 377 U. S. 201.	19
Mayola v. United States, 71 F.2d 65 (9th Cir., 1934).	22
Ong Way Jong v. United States, 245 F.2d 392 (9th Cir., 1957).	22, 23
Panci v. United States, 256 F.2d 308 (5th Cir., 1958).	22
People v. Dorado, 62 Cal. 2d 338.	19
People v. McShann, 50 Cal. 2d 802; 2.2d 330 (1958).	15
Plazola v. United States, 291 F.2d 56 (9th Cir., 1961).	22
Roviano v. United States, 352 U.S. 53, pp. 60, 61 (1956).	14

TABLE OF AUTHORITIES (Continued)

CASES

Page

Sander v. United States, 239 F.2d 239 (9th Cir., 1956)	22
Spano v. New York, 360 U. S. 315.	19
Taylor v. United States, 163 F.2d 737 (C.A., D.C. 1958)	22
United States v. Falcone, 311 U. S. 205, 210 (1940)	22
United States v. Webb, 259 F.2d 558, 562 (6th Cir., 1966)	22

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT

3 MIGUEL LAMENCA,
4 JOSEPH SANTOS,
5 PEDRO MEZA-BUSTAMONTE,

6 Appellants,

7 v.

8 UNITED STATES OF AMERICA,

9 Appellee.

Nos. 21044-5-6

10 Appeal From the United States District Court
11 For the Southern District of California

12 (Formerly Southern Division of the
13 Southern District of California)

14 APPELLANTS' OPENING BRIEF

15 I.

16 STATEMENT OF JURISDICTION

17 This is an appeal from judgments of the United States
18 District Court for the Southern District of California,
19 adjudging three appellants guilty of two counts of a two-
20 count indictment. The indictment charged violations of
21 Title 21, United States Code, §176 (a) and Title 18, §2 -
22 Aiding and Abetting. Three appellants were found guilty of
23 count one of the indictment (conspiracy) and count two of the
24 indictment (smuggling marijuana and aiding and abetting) by
25 verdicts filed November 19, 1965 (Clerk's Transcript, p. 10).
26

(References to the Clerk's Transcript hereinafter designated C.T. and references to the Reporter's Transcript hereinafter designated R.T.) Judgment was imposed as to all appellants on January 10, 1966. Appellant, Lamenca was sentenced to prison for a period of 15 years on each count, to run concurrently. Appellant Meza-Bustamonte was sentenced to prison for a period of 10 years on each count one and two, to run concurrently, and appellant Santos was sentenced to prison for a period of 20 years on each count one and two, the sentences to run concurrently. (C.T., p. 11). A timely Notice of Appeal was filed on behalf of Santos on January 13, 1966, as to Lamenca, on January 13, 1966, and as to Meza-Bustamonte, on January 20, 1966. (C.T., pp. 29, 30, 31).

The District Court has jurisdiction pursuant to the provisions of Title 18, U.S.C., §3231. This court has jurisdiction to entertain the instant appeal from a judgment under Sections 1291 and 1294, Title 28, U.S.C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against all three appellants by the Grand Jury for the United States District Court, Southern District of California, which indictment was filed on July 21, 1965. (C.T., pp. 2, 3, 4). Count one charged essentially that appellants and diverse persons to the Grand Jury unknown, conspired to smuggle marijuana into the United States

1 and, in furtherance thereof, one overt act was committed.
2 The overt act charged was that on May 7, 1965, appellant
3 Pedro Meza-Bustamonte entered the United States from Mexico
4 in an automobile containing approximately ninety-five pounds
5 of marijuana. Count two of the indictment charged that on
6 May 7, 1965, Pedro Meza-Bustamonte smuggled ninety-five
7 pounds of marijuana into the United States and appellants
8 Santos and Lamenca aided and abetted, counseled and induced
9 the commission of this offense. (C.T., pp. 2, 3, 4).

10 After pleas of not guilty had been entered, trial
11 commenced as to appellants on November 16, 1965, before the
12 Honorable Fred Kunzel (R.T., p. 3). At the close of the
13 government's case in chief, a motion for acquittal as to the
14 appellants Santos and Lamenca was made and these motions were
15 denied. (R.T., p. 233). After the motion for acquittal had
16 been denied at the close of the government's case and after
17 the appellant Pedro Meza-Bustamonte had testified, counsel
18 for the appellants Santos and Lamenca attempted to obtain the
19 identity of the informant on the ground that he was a material
20 witness to the issue of guilt or innocence. (R.T., p. 329).
21 The court refused to order the disclosure of the identity of
22 the informant. At the close of all of the evidence, motions
23 for acquittal as to appellants Santos and Lamenca were made
24 again and again denied. (R.T., pp. 368, 369). All three
25 appellants were found guilty. (R.T., pp. 412, 413, 414; C.T.,
26 p. 10).

1 As to the defendants Santos and Lamenca, the time for
2 making a motion for a new trial or, in the alternative, a
3 motion for acquittal was extended from five days of the
4 verdict until January 3, 1966. (R.T., p. 417).

5 The motion for new trial was denied on January 10, 1966.
6 (C.T., p. 11). The appellant Meza-Bustamonte was sentenced to
7 ten years on each count to run concurrently. Appellant
8 Lamenca was sentenced to fifteen years on each count and
9 appellant Santos was sentenced to a period of twenty years on
10 each count, the sentences to run concurrently. (C.T., p. 11).

1 III.

2 SPECIFICATION OF ERRORS

3 1. Appellants were prejudiced by the trial court's
4 refusal to require identification of the informant who was
5 a material witness on the issue of guilt or innocence.

6 2. Each of appellants were substantially prejudiced by
7 the erroneous admission of statements obtained in derogation
8 of their rights counsel and their right to remain silent.

9 3. The evidence was insufficient as a matter of law
10 to sustain the connection of two of the appellants.

1 STATEMENT OF FACTS

2 A. Evidence at Trial Before the Jury.

3 1. Evidence Concerning all the Appellants

4 Customs Inspector Hanson, on May 7, 1965, at about
5 5:40 p.m., searched a Chrysler automobile at the San Ysidro
6 Border Station. (R.T., p. 48). The vehicle entered the
7 United States from Mexico and was being driven by appellant
8 Meza-Bustamonte. (R.T., pp. 47, 48). The search revealed
9 certain packages secreted under the front fenders and right
10 rear door of the vehicle which were ultimately determined to
11 be marijuana. (R.T., pp. 50, 215). The total amount of
12 marijuana was ninety-five pounds. (R.T., p. 51). It was
13 stipulated that the packages, Government's Exhibit No. 1, was
14 taken from the automobile being driven by appellant Meza-
15 Bustamonte and that if a government chemist were called to
16 testify, he would testify that samples taken from Exhibit No.
17 1 contained marijuana. (R.T., p. 215). Hanson testified that
18 the reason for the search was appellant Meza-Bustamonte's (here-
19 after referred to as Meza) unusual nervousness. (R.T., pp.
20 48, 49). However, it was subsequently developed that because
21 of information received from an informant, a look out had been
22 placed at the border for the vehicle. (R.T., pp. 298, 299,
23 300, 302, 303, 315).

24 A green piece of paper, Government's Exhibit No. 2, was
25 found in appellant Meza's watch pocket bearing handwritten
26 figures "666 98 48 Sunset", and "Runi" and "6 2312 Elisa".

1 (R.T., pp., 51, 52).

2 Allegedly taken from appellant Meza's billfold was
3 Government's Exhibit No. 4, a sales slip which contained on
4 the back some printing, "HAILANDERL MOTEL 126 HAILAND AVE.
5 126". (R.T., pp. 56, 57, 360, 361). Appellant Meza denied
6 ever having seen said document before it was shown to him by
7 Agent Gates. (R.T., p. 255).

8 On the same day, May 7, 1965, about 6:10 p.m., Inspector
9 Forster saw appellant Joseph Santos enter the United States
10 from Mexico at San Ysidro Border Station alone driving a 1965
11 Impala automobile containing California license number PGB 125.
12 (R.T., pp. 58, 59). After a brief questioning, Inspector
13 Forster directed appellant Santos to another area for further
14 search and questioning because he appeared unusually nervous.
15 (R.T., p. 60). As in appellant Meza's case it later discovered
16 that a "look out" was placed for the vehicle as the result of
17 information received from the same informant. (R.T., pp. 298,
18 299, 300, 301, 302, 303, 365). Inspector Pitman then searched
19 the vehicle and found a license plate receipt, Government's
20 Exhibit No. 7 underneath the front floor mat. (R.T., pp. 64,
21 65).

22 Appellant Santos also had in his possession Government's
23 Exhibit No. 9, a motel key to the Highlander Motel, Room 126,
24 2051 North Highland Avenue, Hollywood. (R.T., pp. 70, 71, 74,
25 75). A card, Government's Exhibit No. 10, which had written
26 on the back "DU 6-2312" and an installment promissory note were

1 also taken from Santos at the time of the search. (R.T., pp.
2 70, 71, 72).

3 After both appellants Moss and Santos were taken into
4 custody, Agent Gates brought them together and both denied ever
5 having seen each other or ever having had any contact with one
6 another whatsoever. (R.T., pp. 240, 255, 256, 285).

7 About 10:55 p.m. on the evening of May 7, 1965, Investi-
8 gator Rainsberger accompanied by Agent Sutton saw and talked to
9 appellant Lamenca in appellant's room at the Highlander Motel,
10 2051 North Highland Avenue, Hollywood, California. (R.T., p.
11 90). Appellant Lamenca had in his possession at that time
12 \$4,500.00 which allegedly belonged to appellant Santos. (R.T.,
13 p. 91). The agents impounded \$4,000.00, permitting appellant
14 to retain \$500.00. (R.T., pp. 99, 100). Apparently the agents
15 felt that appellant Lamenca had committed no offense for he
16 was not arrested at that time. (R.T., pp 100, 101, 102).

17 New Mexico State Police Patrolman Benavidez, testified
18 that on March 21, 1965, about 2:45 p.m., while on a routine
19 check on U.S. Highway 66, he stopped a westbound 1963 Cadillac,
20 New York license plate NY 212 JS. (R.T., p. 143). In the
21 vehicle were appellant Lamenca and another male. (R.T., p. 144)
22 After being told by appellant Lamenca that the vehicle belonged
23 to appellant Santos, Patrolman Benavidez called Santos in New
24 York and ascertained that the vehicle was being driven to
25 California for resale. (R.T., pp. 145, 146, 147). The motel
26 records of the Hollywood Hills Motel in Hollywood, Government's

1 Exhibit No. 20, indicated that a Lamenca had been registered
2 at the motel from March 22 through April 5, 1965. (R.T., pp.
3 153, 154).

4 Telephone Company and Western Union records revealed that
5 a telegram, Government's Exhibit No. 23, was sent from an
6 unpublished telephone number in New York, registered to appel-
7 lant Santos' wife, addressed to a Mike Lamenca, Halls Motel,
8 Hollywood, California. (R.T., pp. 157-159, 163, 178). The
9 contents of the telegram were two Spanish words "VEN HOY"
10 which translated means, "you come today". (R.T., pp. 163, 166,
11 199, 200). The telegram was signed "Joe". (R.T., p. 164).

12 Appellant Meza testified that prior to his arrest he had
13 never seen or heard of nor had any contact with appellant
14 Santos. (R.T., pp. 240, 255, 256, 285-287). The first time
15 he had ever seen or heard of appellant Lamenca was on November
16 2, 1965, in Court. (R.T., p. 285). Meza denied knowing
17 Patricio Becerra. (R.T., p. 293). Meza further denied any
18 knowledge that his vehicle contained marijuana at the time of
19 his arrest. (R.T., pp. 244, 283). That he first saw the
20 Chrysler minutes before his arrest at a point three blocks
21 from the Border. (R.T., p. 276).

22 Appellants Santos and Lamenca did not testify before the
23 jury.

24 Evidence as to Santos only.

25 Agent Gates was permitted to relate, over the objections
26 of counsel for Santos and Lamenca, that after Santos' apprehen-
sion that he was interviewed and in substance related that he

1 and Lamenca had come from New York City to the west coast to
2 go to Tijuana to get the license plate back of a 1963 Cadillac
3 automobile he had sold in New York City to a Mexican. He
4 wanted the plates back because the plate was issued in his
5 name. At first Santos denied that Lamenca had gone to Tijuana
6 with him but after Santos was informed that it was known that
7 Lamenca had registered with him at the same motel, Santos
8 stated Lamenca had gone to Tijuana with him.

9 Gates further related that after he told Santos that two
10 items had been found on Meza, a telephone number which was the
11 same as one written on the back of a business card possessed
12 by Santos, and a slip of paper which contained the name and
13 address of the same motel for which Santos possessed a key,
14 Santos then stated, "The damage is done". (R.T., pp. 70-79).

15 Agent Murphy, over the objection of Santos' counsel, was
16 permitted to relate that in a conversation he had in New York
17 with Santos on May 18, 1965, he related that on March 22, 1965,
18 he had sold his 1963 Cadillac for \$4,000.00 to a Mexican male.
19 Santos further stated that after the sale the Mexican drove
20 off with the car to Tijuana, with the New York State plates
21 still affixed to the vehicle. (R.T., pp. 108-109). Agent
22 Murphy related out of the hearing of the jury, that he knew
23 that Santos had retained an attorney in San Diego. (R.T., pp.
24 11, 29).

25 Evidence as to Lamenca only.

26 Over objection of counsel for Santos, Agent Murphy was

1 permitted to relate a conversation he had with Lamenca on
2 July 22, 1965, at Lamenca's home in New Jersey at the time he
3 arrested Lamenca. Murphy related that Lamenca stated that
4 Santos had paid his fare to Los Angeles on the May 1965 flight.
5 Santos gave him \$4,500.00 to hold, and subsequently customs
6 officers appeared at his motel and had impounded \$4,000.00
7 after permitting him to retain \$500.00 to return home from
8 California. (R.T., pp. 111, 112).

9 B. Matters and Evidence Presented Outside the Hearing of
10 the Jury.

11 1. Counsel for Santos and Lamenca objected to the Government
12 mentioning in its opening statement, certain conversations
13 government officers had with the two aforementioned appellants
14 on the ground that said conversations would be prejudicial in
15 the event a corpus delicti were not established and on the
16 further ground that there had been no effective waiver of
17 counsel at the time the conversations took place. (R.T., pp.
18 5, 6, 7, 8, 12, 13, 14, 32).

19 On May 18, 1965, Agent Murphy, conversed with Santos at
20 his place of business in the Bronx. (R.T., p. 10). During the
21 conversation Santos advised Murphy that he had an attorney in
22 San Diego but none in New York. (R.T., p. 11). After advising
23 Santos that he thought that Santos should have an attorney in
24 New York, Agent Murphy proceeded to converse with Santos con-
25 cerning the 1963 Cadillac transaction. (R.T., p. 11). See
26 also Agent Murphy's testimony before the jury. (R.T., pp. 108-

109, Inc.).

Murphy related that on the day he arrested Lamenca he conversed with him in Lamenca's bedroom. (R.T., pp. 15, 17, 19). At the time that Murphy first conversed with Lamenca he knew that Lamenca did not have an attorney, but was trying to get Lamenca's cooperation. (R.T., p. 15). The conversation was in English, although Lamenca's English is not fluent and Murphy does not speak Spanish. (R.T., p. 22).

Murphy further related, that after the usual warnings of his right to counsel, the right against self-incrimination, right to an attorney, he arrested Lamenca and this is when Lamenca made the statements about the trip to California in May with Santos and the money belonging to Santos. (R.T., pp. 16, 18).

Counsel's objections were overruled. (R.T., pp. 15, 33). The court stated in substance that if the conversations were admissible as evidence they could be referred to by the government in its opening statement. (R.T., p. 33). The court further related that as far as it had been able to ascertain, no Federal Court has gone as far as the California Court on this question of the admissibility of statements made in the absence of counsel and that under the present state of the law, he would have to overrule the objection as to Lamenca also. (R.T., pp. 33).

2. Revealing the Identity of the Informant

After appellant Meza terminated testifying on his own behalf, the question of the informant was taken up out of the

1 presence of the jury. In the interest of time, government's
2 attorney, Phillip W. Johnson waived any hearsay objection as
3 to Agent Gates, stating what information he had received, but
4 did not waive the objection to the question that would tend
5 to reveal the identity of the informant. (R.T., p. 298).

6 Customs Agent, Gates was then called as a witness. Agent
7 Gates related that the information that was received in
8 connection with this case that caused the vehicle of Meza to
9 be stopped was relayed through a customs secretary, Barbara
10 Abrenilla. (R.T., p. 299). Pursuant to the same information
11 furnished the secretary by the informant a "look out" was put
12 out for the automobile that was subsequently found to be driven
13 by appellant Santos. (R.T., p. 299). The information was
14 received on May 7, 1965, about 4:00 p.m. R.T., p. 300).

15 Over the government's objection, Gates related that he
16 received information that the '55 Chrysler had driven in a
17 garage which belongs to Patricio Becerra in Tijuana. (R.T., p.
18 301, 302). The garage is located in the area of La Mesa which
19 is approximately five to seven miles east of downtown Tijuana
20 and the Border. (R.T., p. 302). The information alleged that
21 the residence where the garage is located belongs to Patricio
22 Becerra. (R.T., p. 302). Gates received information that
23 Patricio was seen to enter the garage with several gunnysacks in
24 his possession and the garage door was closed. (R.T., p. 302).
25 Several other Latin persons were in the garage with Patricio.
26 (R.T., p. 303).

1 With reference to the information received by the Customs
2 Agency and Gates concerning the Chevrolet automobile driven by
3 Santos at the time of his arrest, Gates related that the
4 information he received was that two men had arrived at the
5 same garage in a white Chevrolet bearing California license
6 number PGB 125; that the garage doors had been opened and the
7 vehicle taken into the garage. (R.T., p. 303). The vehicle
8 stayed in the garage approximately five minutes and then was
9 driven out of the garage and parked on the street and that then
10 the Chrysler was put into the garage immediately thereafter.
11 (R.T., p. 303). The information received also indicated that
12 after the Chevrolet was driven and parked on the street, the
13 people in the Chevrolet remained in the area. (R.T., p. 303).

14 Shortly after the arrest of the two men, Meza and Santos,
15 Gates received further information directly from the informant.
16 (R.T., p. 304). Gates related that he knew the identity of the
17 informant. (R.T., p. 304).

18 Santos and Lamenca, through their respective counsel then
19 asked Agent Gates who the informant was who gave him the in-
20 formation directly after the arrest or the person who relayed
21 the information to the secretary. (R.T., pp. 305, 328, 329).
22 The demand for the identity of the informant who was an eye
23 witness to the loading of the Chrysler and who saw the Chevrolet
24 along with several men of Latin extraction at the alleged
25 garage belonging to Patricio Becerra, was denied by the court.
26 (R.T., p. 305-328, Inc.). The court refused to order.

1 disclosure. (R.T., pp. 328, 329).

2 The court then stated that at this posture it would
3 not require the government to reveal the identity of the
4 informant without hearing from the appellant Santos so that
5 it could determine whether or not the informant might assist in
6 his defense. (R.T., p. 305). The court reiterated that it
7 would not grant the request until he heard from the appellant
8 Santos. (R.T., p. 307).

9 Santos, through his counsel, pointed out to the court that
10 because of the court's ruling the appellant was now placed in
11 a position of being forced to give up his right against self-
12 incrimination, even though he was to testify out of the presence
13 of the jury, particularly in view of the fact that he felt the
14 materiality of the informer's testimony had been shown. Counsel
15 further stated that since the Court had indicated that it
16 would not grant the demand until it heard from Santos, the
17 appellant Santos would take the stand out of the presence of
18 the jury to attempt to establish in the court's mind the mater-
19 iality of the informer. (R.T., pp. 309, 310).

20 Joseph Santos was then called to testify out of the
21 presence of the jury. He related that on May 7, 1965, he had
22 talked to Patricio Becerra in Tijuana in connection with the
23 sale and registration of a car. (R.T., pp. 312, 313). He
24 talked to Becerra outside a new house that apparently was unoccu-
25 pied. (R.T., p. 313). All during his conversation with Becerra
26 his vehicle was parked on the street. (R.T., p. 314).

1 Santos related that while discussing the matter of the automo-
2 bile registration with Becerra he never saw a '55 Chrysler
3 automobile at anytime nor did he see a garage at that location.
4 (R.T., p. 315, 316). He described the premises as a house with
5 an iron fence all around it. (R.T., p. 315). A welding truck
6 and two automobiles, a Plymouth and an Oldsmobile were also in
7 the immediate vicinity. (R.T., p. 315).

8 Santos further related that he received \$4,000.00 in New
9 York when he sold the Cadillac automobile to a man he thought
10 to be Patricio Becerra. (R.T., p. 318). It later turned out
11 that the purchaser was the nephew of Patricio Becerra. (R.T.,
12 pp. 318, 319). Santos stated that when the automobile was
13 sold it was agreed that Lamenca would drive it to Los Angeles
14 and upon arrival there the purchaser would straighten out the
15 registration and give Lamenca the license plates so that
16 Lamenca could return with them to New York to give to Santos.
17 (R.T., p. 319). It was agreed that if the purchaser could not
18 register the car in his name, the money would be refunded.
19 (R.T., p. 319). His sole purpose for the trip and talk with
20 Becerra was to straighten out the matter of registration.
21 (R.T., p. 318). The court refused to order disclosure. (R.T.,
22 p. 328, 329).

23 3. Motion for Mistrial

24 After the question of the informant had been argued and
25 determined, out of the presence of the jury, Agent Hanson was
26 called to testify as a rebuttal witness before the jury.

1 (R.T., p. 360). Previously in the government's case in chief,
2 Hanson had testified that the reason he searched the Chrysler
3 was because appellant Maza appeared unusually nervous.

4 (R.T., pp. 48, 49). Hanson related on rebuttal that at 7:00
5 o'clock on the day in question he was not aware that appellant
6 Santos had been arrested. (R.T., p. 364). Counsel for Santos
7 then asked, "In other words, you didn't have any knowledge of
8 any purported connection between the two". (R.T., p. 365).

9 Hanson answered, "No sir, excepting the search report-- or the
10 look out." A motion to strike the answer was granted. (R.T.,
11 p. 365). A motion for mistrial on the grounds that the witness
12 had deliberately gone into the question of "look out" was
13 denied. (R.T., p. 368).

EXHIBIT

A. SUBSTANTIAL PREJUDICE RESULTED TO ALL APPELLANTS
ON THE TRIAL COURT'S REFUSAL TO REQUIRE IDENTIFICATION
OF THE INFORMANT.

The government's case in substance was that appellants Lamenea and Santos and Meza were members of a conspiracy to smuggle marijuana into the United States from Mexico. The only overt act alleged was that Meza drove an automobile into the United States containing marijuana. The second count charged Meza with smuggling and Santos and Lamenea with having aided, abetted, counseled and encouraged Meza to smuggle the same ninety-five pounds of contraband into the United States.

Meza testified that he had no knowledge that there was contraband in the Chrysler automobile in which he was stopped at the Border. He testified in effect, that he had been duped by two men, not Santos nor Lamenea, into driving the car across the Border in exchange for a ride to Los Angeles. Meza fully testified as to how and by whom he was duped. After Meza had testified, but before either appellant Lamenea or Santos had rested, it was developed through Agent Gates that the government had received information from an eye-witness to the loading of the Chrysler, and also information was received that the automobile in which Santos was later arrested was at a residence in the La Mesa area, Tijuana owned by Patricio Becerra. The Chrysler automobile in which later both Meza and the contraband was found was also seen at this residence.

1 The informant also related that he had seen Mesa in the
2 Chevrolet automobile; that he had seen the Chrysler automobile
3 being driven into a garage at this residence where one Patricia
4 Escobar and several Latin persons apparently loaded the vehicle
5 with contraband. At this point a request was made to court
6 order the government to disclose the identity of the informant
7 as he was a material eye-witness to a substantial portion of
8 the crimes charged. Counsel was permitted to explain that if
9 Mesa's testimony could be corroborated it would show that
10 perhaps that the two men who had prevailed upon him to drive
11 the car were the persons at the residence where the Chrysler
12 was loaded, and that appellant Mesa was not there at the time
13 the Chrysler was loaded. This, of course, would corroborate
14 Mesa's testimony and could very well have raised a reasonable
15 doubt as to his guilt. Because of the nature of the pleadings
16 weaknesses in the case against Mesa causing it to fail would
17 also cause the case against his co-appellants to fail. The
18 court refused to order disclosure. The law appears to be
19 clear that the informant privilege gives away where his identity
20 might be relevant and helpful to the defense of the accused, or
21 might be essential to a fairer determination of the cause.

22 Rovito v. United States, 381 U.S. 59, pp. 60, 61 (1955). The
23 court's refusal to order the disclosure in this case, deprived
24 appellants, and each of them, on the witness stand of an eye-witness
25 to events constituting the crimes charged against them. Cor-
26 roborations of the testimony of the appellant Mesa or any other

1 weakness of the government's case shown by the eye witness
2 would have resulted in different verdicts by the jury.

3 1. After refusing to order production of the identity of
4 the informant, the court further erred in inviting Santos to
5 testify and to give up his constitutional privilege. It is
6 submitted that there was no burden on any of the appellants
7 to do more than raise a reasonable doubt as to their guilt or
8 to do more than to establish that there was an eye-witness to
9 the crime whose testimony might be helpful to them either by
10 way of corroboration or by further testimony on the merits.
11 Appellants are aware of the decisions of this circuit that hold
12 an informant's identity was not shown to be material on the
13 question of guilt or innocence. Garibay-Garcia v. United
14 States, 262 F.2d 509 (9th Cir., 1966). Alexander v. United
15 States, 362 F.2d 379 (9th Cir., 1966). Cook v. United States,
16 354 F.2d 529 (9th Cir., 1965). Hurst v. United States, 344
17 F.2d 327 (9th Cir., 1965).

18 Appellants concede that there is nothing in the record that
19 shows whether or not the informant was a participant in the
20 offense. It seems that the rule that should govern our case
21 has been well expressed by the California Supreme Court, People
22 v. McShann, 50 Cal.2d 802; P.2d 330 (1958).

23 "Disclosure is not limited to the informer who
24 participates in the crime alleged; The information
25 elicited from an informer may be 'relevant and helpful
26 to the defense of the accused or essential to a fair
determination of a cause' even though the informer was
not a participant. For example, the testimony of an
eye witness-nonparticipant informer that would vindicate

1 the innocence of the accused and essential to a fair
2 determination of the cause.

3 "Disclosure is frequently a problem in such cases
4 as the present one involving violations of the narcotics
5 laws, when the so-called informer is also a material
6 witness on the issue of guilt. A mere informer has a
7 limited role. 'When such a person is truly an informant
8 he simply points the finger of suspicion toward a person
9 who has violated the law. He puts the wheels in motion
10 which cause the defendant to be suspected and perhaps
11 arrested, but he plays no part in the criminal act with
12 which the defendant is later charged.' (People v.
13 Lawrence, supra, 149 Cal. App. 2d at 450). His identity
14 is ordinarily not necessary to the defendant's case,
15 and the privilege against disclosure properly applies.
16 When it appears from the evidence, however, that the
17 informer is also a material witness on the issue of
18 guilt, his identity is relevant and may be helpful to
19 the defendant. Nondisclosure would deprive him of a
20 fair trial. Thus, when it appears from the evidence
21 that the informer is a material witness on the issue
22 of guilt and the accused seeks disclosure on cross-
23 examination, the People must either disclose his
24 identity or incur a dismissal. (See Roviaro v.
25 United States, supra, 353 U.S. at 61)."

26 50 C.2d at page 808.

2. The prejudice that resulted from the failure to order
the disclosure of the identity of the informant was then com-
pounded when the trial court refused to grant a mistrial.

A Customs Agent, in rebuttal, brought before the jury
that there was a "look-out" purporting to connect Santos and
Meza. Thus, as often happens, when the jury is removed from
the courtroom, but the witnesses remain, a witness will later
inject before the jury the matters that the court so carefully
kept from them.

Thus, appellants' having been deprived of the opportunity
to use the testimony of the eye-witness for their benefit,
were saddled with the burden of having the jury believe that

1 the government may have had prior knowledge of some criminal
2 partnership between two of the appellants.

3 Not being permitted to examine reports relating to the
4 informant, and not knowing his identity appellants were unable
5 to even attack the veracity of the source of the "look-out".
6 Thereby appellants were doubly prejudiced by the failure of the
7 court to grant the motion for a mistrial or to compel identi-
8 fication of the informant.

ARGUMENT

APPELLANTS WERE PREJUDICED BY THE ADMISSION OF THEIR STATEMENTS WHERE SUCH STATEMENTS WERE OBTAINED WITHOUT A SHOWING OF AN INTELLIGENT WAIVER OF COUNSEL

1. Appellant Meza-Bustamonte

At the time Meza was stopped by the authorities he was a prime suspect, his car was the subject of a "look-out" and the contraband was found in his car and he had been placed in custody. The government was then permitted to impeach Meza from his conversations with Customs Agent Hanson. Meza spoke only Spanish but no evidence was offered to show that he was ever advised of his rights either in Spanish or English prior to his questioning.

2. Appellant Lamencia

Lamencia was arrested July 22, 1965; it was stated that the officer who questioned him spoke no Spanish, and advised him of his rights did so in English. Lamencia spoke poor English. There was no affirmative showing of any intelligent waiver of counsel.

3. Appellant Santos

Conversations were admitted against Santos, although he was represented by counsel, that were obtained without the consent of counsel and in counsel's absence.

Agent Murphy claimed that he went to see Santos only to obtain the registration slip on a Volkswagen seized for forfeiture in connection with this case and that Santos insisted on talking about other aspects of the case. Murphy inadvertently revealed the true nature of his visit and the extent of his

1 interest in the following testimony:

2 "I couldn't get any more details out of him as to
3 why a man from Tijuana would come all the way..." (R.T.,
4 p. 134). Although Murphy knew Santos had been indicted and
5 that Santos had counsel, no attempt was made to contact counsel.
6 Further no attempt was made to obtain an interpreter to
7 determine whether or not Santos knowingly wished to waive his
8 constitutional rights.

9 Each of the appellants spoke Spanish; all required the
10 use of an interpreter at the trial. There was nothing to
11 indicate that any of the appellants were well educated or had
12 ever studied law. The conversation complained of were obtained
13 after each was a prime suspect of the crimes charged. No
14 evidence was ever offered to show that they ever knowingly,
15 waived their constitutional right to remain silent or their
16 right to counsel after a full disclosure of these rights in
17 Spanish. Crooker v. California, 357 U.S. 433; Somo v. New
18 York, 360 U.S. 315; Malliah v. United States, 377 U. S. 201;
19 Escobedo v. Illinois, 378 U.S. 478; Pae. v. Dorado, 62 Cal. 2d
20 338.

1 THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW
2 TO SUSTAIN THE CONVICTIONS OF APPELLANT LAMENCA

3 Evidence presented for consideration by the trier of
4 fact was set forth separately in the statement of facts.
5 Excluding all inadmissible statements, either allegedly made
6 by Lamencá or the other two appellants, the sum total of the
7 matters actually presented to the jury established only the
8 following: A vehicle being driven by appellant Mesa entered
9 the United States on May 7, 1966, about 5:40 p.m. A subse-
10 quent search of the vehicle revealed about 95 pounds of mari-
11 juana on the person of appellant Mesa, allegedly, there was
12 found a piece of paper which purportedly contained the name,
13 room number and address of the motel where later on that
14 same evening custom's agents interviewed Lamencá.

15 About half an hour after appellant Mesa was stopped and
16 searched, appellant Santos was taken into custody at the Border
17 at San Ysidro, California while entering the United States in
18 a vehicle from Mexico. In appellant Santos' possession a key
19 to the motel room where appellant Lamencá was interviewed was
20 found.

21 At the time appellant Lamencá was interviewed by the
22 agents at the motel room he possessed \$4,500.00 which allegedly
23 belonged to appellant Santos.

24 Other than the foregoing, there was absolutely nothing
25 upon which the trier of fact could have concluded beyond a
26 reasonable doubt that appellant was guilty of the offenses of

1 which he was convicted. There was absolutely no testimony
2 concerning Lardave's death, false documentary statements, pre-
3 vious contact with or knowledge of appellant, or any of the
4 matters ordinarily relied upon by the government. In addition,
5 there was absolutely nothing to link the appellant with the
6 automobile containing the defendant or appellant Meza, driver
7 of the vehicle in which the defendant was found. Appellant
8 Meza emphatically denied ever knowing, hearing or seeing
9 appellant Lamencia prior to the date they appeared in court on
10 November 2, 1965. Appellant Lamencia was taken some 125 miles
11 away from the border on the day in question and was apparently
12 released by the agents on the basis that he had committed no
13 offense. There was no evidence, whatsoever, indicating that
14 Lamencia had been in Mexico on the day in question.

15 Compare this case with the recent case of Mar-Hassada
16 v. United States, 364 F.2d, 741 (9th Cir., 1966), in which
17 this court held, as to appellant Marrero-Peres, that the
18 evidence was insufficient to sustain the conviction as a matter
19 of law. The evidence against Marrero-Peres was much stronger
20 than that presented against appellant Lamencia.

21 Accordingly the evidence as to appellant Lamencia wholly
22 fails to sustain the conviction.

23 "There is, of course, evidence of an intimate
24 personal relationship between William and Josephine,
25 who handled the heroin in question. But guilt may
26 not be inferred from mere association. Ony Way Jong
v. United States, 378 F.2d, 120 (9th Cir., 1967), 37-47.

.....

1 THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW
2 TO SUSTAIN THE CONVICTION OF APPELLANT SANTOS

3 Santos was stopped at the Border 25 minutes after Meza
4 and the contraband had been stopped at the Border. He had in
5 his possession the key to Room 126 of Highlander Motel in
6 Los Angeles, an automobile registration showing the transfer
7 of a vehicle to one Patricio Becerra and a card with the
8 telephone number DU 6-2312.

9 Meza had a sales slip showing the purchase of some items
10 by Patricio Becerra on the face with Hailand Motel 126 on the
11 back. He also had a piece of paper with handwritten numbers
12 "666 98 48 Sunset", the word "Runi" and "62312 Elisa." There
13 was no other connection shown between Santos and Meza or
14 Lamenca and Meza, although past association of Santos and
15 Lamenca were shown.

16 This evidence is insufficient to prove Santos a member of
17 the charged conspiracy and insufficient to sustain guilt. Ong
18 Way Jong v. United States, 245 F.2d 392 (9th Cir., 1957).
19
20
21
22
23
24
25
26

1 VI.

2 CONCLUSION

3 For the foregoing reasons, it is respectfully submitted
4 that the judgment of conviction should be reversed. In the
5 event that the reversal is based on the last point urged,
6 to-wit, insufficiency of the evidence as a matter of law, then
7 the remand to the District Court should be accompanied by
8 instructions by this court to dismiss. See: Diaz-Rosendo v.
9 United States, 364 F.2d 941 (9th Cir., 1966).

10 Respectfully submitted:

11 SHEELA, O'LAUGHLIN, HUGHES & CASTRO

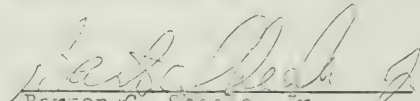
12
13 By Barton C. Sheela, Jr.
14 Barton C. Sheela, Jr., Attorneys
15 for Appellant Santos


16 SHEELA, O'LAUGHLIN, HUGHES & CASTRO

17
18 By Ramon Castro
19 Ramon Castro, Attorneys for
20 Appellants Lamenca and Meza-Bustamonte

CERTIFICATE

We, Barton C. Sheela, Jr., and Ramon Castro, certify,
in connection with the preparation of this brief, we have
examined Rules 18 and 19 and that, in our opinion, the
foregoing brief is in full compliance with those rules.


Barton C. Sheela, Jr.


Ramon Castro

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss

SANDRA J. WILKES, being first duly sworn, deposes
and says:

That she is a citizen of the United States and a resident
of San Diego County, California; that her business address is
1101 U. S. Grant Hotel, San Diego, California; that she is over
the age of eighteen years, and not a party to the within action.

That on January 13, 1967, she deposited in the
United States mail, San Diego, California, in the within action,
Nos. 21044-5-6 MIGUEL LAMENCA, JOSEPH SANTOS, PEDRO
MEZA-BUSTAMONTE v. UNITED STATES OF AMERICA,

in an envelope bearing the requisite postage, a copy of

APPELLANT'S OPENING BRIEF

addressed to:

Edwin L. Miller, Jr.
United States Attorney
Southern District of California
332 United States Courthouse
325 West "F" Street
San Diego, California 92101

at which place there is a delivery service by United States
mails from said post office.

Sandra J. Wilkes
Sandra J. Wilkes

SUBSCRIBED and SWORN to before me

this 13th day of January, 1967.

Helen K. Teague
Notary Public in and for said State and
County



HELEN K. TEAGUE
NOTARY PUBLIC
Principal Office, San Diego Co., Cal.

NOS. 21044,
21045,
21046

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

APR 27 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

MAY 1 1967

NOS. 21044,
21045,
21046

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	3
V ARGUMENT	13
A. FAILURE TO REQUIRE DISCLOSURE OF THE INFORMANT DID NOT CONSTITUTE ERROR	13
B. STATEMENTS BY APPELLANT MEZA-BUSTAMONTE WERE PROPERLY RECEIVED IN EVIDENCE	20
C. STATEMENTS BY APPELLANT LAMENCA WERE PROPERLY RECEIVED IN EVIDENCE	21
D. STATEMENTS BY APPELLANT SANTOS WERE PROPERLY RECEIVED IN EVIDENCE	22
E. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT SANTOS	25
F. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT LAMENCA	28
VI CONCLUSION	31
CERTIFICATE	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Aguilar v. United States, 363 F.2d 379, 381 (9th Cir. 1966)	15, 18
Alexander v. United States, 362 F.2d 379, 383 ((th Cir. 1966)	15
Border Guard, Don Whitehead, New York, 1963, p.115	17
Cook v. United States, 354 F.2d 529, 531 (9th Cir. 1965)	15
Crooker v. California, 357 U.S. 433 (1958)	24
Curtis v. United States, 297 F. 2d 639 (5th Cir. 1961), cert. denied, 369 U. S. 838 (1962)	27, 31
Diaz-Rosendo v. United States, 357 F.2d 124, 130 (9th Cir.1966), cert. denied, 385 U.S. 856 (1966)	28
Eason v. United States, 281 F.2d 818 (9th Cir. 1960).	26, 31
Escobedo v. Illinois, 378 U.S. 478 (1964)	24
Fenton v. United States, 308 F.2d 246 (9th Cir. 1962)	16
Ford v. United States, 273 U. S. 593, 602 (1927)	16
Garibay-Garcia v. United States, 362 F. 2d 509 (9th Cir. 1966)	15
Hiram v. United States, 354 F.2d 4, 7 (9th Cir. 1965)	24
Hurst v. United S ates, 344 F.2d 327, 328 (9th Cir. 1965)	15, 19

Johnson v. New Jersey, 384 U. S. 719, 734 (1966)	21
Jones, v. United States, 326 F.2d 124, 127, 129 (9th Cir. 1963), cert. denied, 377 U. S. 956 (1964)	20
King v. United States, 348 F.2d 814, 819 (9th Cir. 1965), cert. denied, 382 U. S. 926 (1965)	15
Lawn v. United States, 355 U. S. 339, 359, 362 (1958)	16
Leyvas v. United States, 371 F.2d 714, 717 ((th Cir. 1967	15
Massiah v. United States, 377 U. S. 201 (1964)	24, 25
McCray v. Illinois, United States Supreme Court, March 20, 1967	17, 19
Miranda v. Arizona, 384 U. S. 436 (1966)	21, 25
Meyers v. United States, 310 F. 2d 801 (5th Cir. 1962)	27, 28
Ramirez v. United States, 294 F. 2d 277, 283 (9th Cir. 1961)	14, 20
Raymond v. United States, 9th Cir. No. 20668, April 14, 1967	16
Roviaro v. United States, 353 U. S. 53, 62 (1957)	17, 18
Sabari v. United States, 333 F. 2d 1019, 1021 (9th Cir. 1964)	28
Spano v. New York, 360 U. S. 315 (1959)	24
Smith v. United States, 9 F.2d 386, 387 (9th Cir. 1925)	14

CasesPage

Stein v. United States , 166 F. 2d 851 , 855 (9th Cir. 1948) , cert. denied , 334 U. S. 844 (1948)	14
United States v. Estep , 151 F. Supp. 668 , 672-73 (N.D. Texas 1957)	18
J. Edgar Hoover , 58 Yale Law Journal 404	17

Statutes

Title 18 , United States Code , Sections 2 and 3231	1
Title 21 , United States Code , Section 176a	1
Title 28 , United States Code , Sections 1291 and 1294	1
Rule 52(a) Federal Rules of Criminal Procedure	14

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in both counts of a two-count indictment, following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE

Count One of the two-count indictment alleged that appellants Miguel Lamenca, Joseph Santos, and Pedro Meza-Bustamonte and other persons conspired to smuggle marihuana into the United States [R.T. 392-93].¹

Count Two alleged that appellant Meza-Bustamonte smuggled approximately 95 pounds of marihuana into the United States and that appellants Lamenca and Santos knowingly aided, abetted, counseled, induced, and procured the commission of that offense [R.T. 393].

Jury trial of appellants commenced on November 16, 1965, before United States District Judge Fred Kunzel [R.T. 3]. The three appellants were found guilty as charged in both counts of the indictment on November 19, 1965 [R.T. 412-14].

Thereafter, on January 10, 1966, appellant Meza-Bustamonte was sentenced to ten years in prison upon each count, to run concurrently; appellant Lamenca was sentenced to fifteen years in prison upon each count, to run concurrently; and appellant Santos was sentenced to twenty years in prison upon each count, to run concurrently. The sentence of Meza-Bustamonte was later reduced to five years upon each count, to run concurrently [C.T. 26-28].²

Appellants subsequently filed notices of appeal [C.T. 29-31].

¹ "R.T." refers to the Reporter's Transcript of Proceedings.

² "C.T." refers to the Clerk's Transcript of Record.

ERROR SPECIFIED

Appellants specify the following points upon appeal:

"1. Appellants were prejudiced by the trial court's refusal to require identification of the informant who was a material witness on the issue of guilt or innocence.

"2. Each of appellants was substantially prejudiced by the erroneous admission of statements obtained in derogation of their rights counsel and their right to remain silent.

"3. The evidence was insufficient as a matter of law to sustain the connection of two of the appellants." (i.e., Lamenca and Santos).

(Appellants' Opening Brief, p. 5-a).

IV

STATEMENT OF THE FACTS

Appellant Meza-Bustamonte entered the United States from Mexico at San Ysidro, California, at approximately 5:40 p.m. on May 7, 1965. He was the driver and sole occupant of a 1955 Chrysler automobile [R.T. 47-48].

He told Customs Inspector Lloyd Hanson that he had no merchandise from Mexico. He became nervous and started sweating. Inspector Hanson questioned him concerning ownership of the vehicle and was told that it belonged to "friends." The vehicle was taken to the secondary inspection area, where 46 packages were found under the fenders and 5 more inside a rear door [R.T. 47, 49-50].

It was stipulated that a chemist would testify that samples taken from

"chain of possession" of the packages [R.T. 50-51, 68-69, 215]. The packages weighed approximately 95 pounds. The selling price of the marihuana in Tijuana, Mexico, was approximately \$1,425 [R.T. 51, 70].

A piece of green newspaper material was found in the watch pocket of Meza-Bustamonte. This piece of paper contained handwriting, including the number, "6 2312." [R.T. 52-53].

The billfold of Meza-Bustamonte contained a sales slip in the Spanish language with the purchaser listed as "Patricio Becerra." The reverse side contained the following:

"Hailanderl
Motel 126
Hailand Ave.
126."

[R.T. 56-57; Government Exhibit 4, Supplemental Transcript of Record].

Appellant Joseph Santos entered the United States from Mexico at the same port of entry (San Ysidro) at approximately 6:10 p.m. on the same date [R.T. 59], about 30 minutes after the entry of Meza-Bustamonte. He was the driver and sole occupant of a 1965 Impala automobile. He was "rather nervous" [R.T. 59-60].

The Impala was sent to the Customs secondary area, where a search occurred and a license plate receipt was found underneath the floor mat in front of the front seat. The receipt was in the name of Joseph Santos. It was for a 1963 Cadillac Automobile with license number 212-JS, and it showed a transfer of ownership to Patricio Becerra, [R.T. 60, 64-65; Government Exhibit 7, Supplemental Transcript of Record].

A Highland Motor Hotel key, number 120, was in the possession of Santos. The address of the motor hotel was 2051 N. Highland Ave., Hollywood, California [R.T. 71; Government Exhibit 9, Supplemental Transcript of Record].

Santos also had an Econo-Car business card which contained the number, "DU 6-2312," in hand-printing upon the reverse side [R.T. 71-72; Government Exhibit 10, Supplemental Transcript of Record]. "DU" was the prefix used for Tijuana telephone numbers [R.T. 75].

Santos also had an installment promissory note involving the purchase of a 1963 Cadillac. The document was dated December 20, 1962, and involved payments amounting to \$2280. The Cadillac serial number upon this document was the same as the Cadillac vehicle identification number upon the receipt found underneath the floormat [R.T. 72] Government Exhibits 7, 11, Supplemental Transcript of Record].

United States Customs Agent Walter Gates advised appellant Santos concerning his legal rights and questioned him. Santos stated that he had come to the West coast to see the country; that he had left New York City by United Air Lines by himself on May 6, 1965; that he then had approximately \$600 in his possession; that he rented a car in Los Angeles and went to a motel; that he drove to Tijuana by himself upon the following day; and that a girl gave him her telephone number there, 6-2312 [R.T. 68, 72-74].

Agent Gates then informed Santos that the officers were aware that a Mr. Lamenca had checked into the motel with him at Los Angeles. Santos replied that Lamenca had come with him from New York; that Lamenca was

had gone with him to Tijuana on the trip; that Lamenca stayed in Tijuana; and that Lamenca did not have a key to the motel room [R.T. 74].

Santos was then advised that Mr. Meza-Bustamonte had the same telephone number that Santos had and that Mr. Meza-Bustamonte had a piece of paper with the words "Highlander Motel, 126, Highland Avenue," which exactly fit the motel key designation on the key in the possession of Santos [R.T. 74-75]

Santos stated, "The damage is done now." [R.T. 75].

He also stated that he had made a sale, in New York City, of a 1963 Cadillac, selling it to a male Mexican who had been introduced to him by Mr. Lamenca. He stated that the true purpose of the trip by air to the West Coast was to recover the New York license plates which were still on the vehicle [R.T. 75].

Supervisory Customs Port Investigator Robert L. Rainsberger talked to appellant Lamenca on the night of May 7, 1965, at Lamenca's room at the Highlander Motel, 2051 North Hollywood Avenue, Hollywood, California. Lamenca was advised concerning his legal rights. He had \$4500 in cash in his possession [R.T. 88-90, 92].

Lamenca stated that on the night of May 6, he came to Hollywood, California, from New York City by United Air Lines with his employer, a Mr. Santos; that they came to the Hollywood area and registered at the Highlander Motel; that his reason for coming was to visit and also because his employer had asked him to come out at no expense to Lamenca; that Santos gave him \$4000 to hold for safekeeping; that on May 7, Santos told

Lamenca that he had to go somewhere; and that Lamenca did not ask him where he was going [R.T.91] .

Lamenca also stated that he had gone to see a movie that day, but he added that he did not remember what it was about. Lamenca had only \$5 of his own in his possession. He stated that his address was 860 Hunts Avenue, Bronx 59, New York [R.T. 91-93,106]. Lamenca had moved from 860 Hunts Avenue to 810 Hunts Avenue prior to October 9, 1964, and moved from 810 Hunts Avenue to a third address on October 9, 1964 [R.T. 139-40].

Lamenca was not arrested by Investigator Rainsberger [R.T. 101]

Customs Agent Finbarr J. Murphy interviewed appellant Santos on May 18, 1965, in New York City, for the purpose of obtaining information concerning a Volkswagen that was under seizure and obtaining the New York registration form for the Volkswagen. Santos stated that agents in San Diego had the registration.

Agent Murphy said, "Okay, that's what I was after." Santos followed Murphy to the door and started to talk about the Cadillac involved in the San Ysidro case. Murphy asked Santos whether he had an attorney, Santos replied in the affirmative, Murphy mentioned the possibility of obtaining an attorney in New York, and Santos continued to talk about the Cadillac[R.T.10-11, 107-09].

3

A portion of this testimony regarding the purpose of the interview and the discussion of the right to counsel was heard outside of the presence of the jury.

to a Mexican resident of Tijuana; that the sale was for \$4000; that the money was paid to Santos at his place of business in the Bronx; that the Mexican drove away with the car from the place of business in the Bronx, headed for Tijuana; that the New York license plates were still attached to the vehicle; and that he, Santos, had never been to California before May, 1965 [R.T. 109-10].

However, Trans World Airline records and Diners' Club records showed a charge to appellant Santos for \$152.36 for an air flight from New York to Los Angeles on December 9, 1964 [R.T. 174-75, 201-03].

On March 21, 1965 (the day before the March 22 date furnished by appellant Santos as the date of the alleged sale of the Cadillac in New York), the 1963 Cadillac with New York license number 212-JS was stopped 23 miles east of Grants, New Mexico, by New Mexico State Police Patrolman Albert Benavidez. It was headed in a westerly direction and was being driven by one "Iglesias." Appellant Lamenca was a passenger [R.T. 109-10, 142-44].

"Iglesias" told Officer Benavidez that he was assisting Lamenca with the driving. Lamenca stated that they were driving the vehicle to California to sell it for the owner, who was his employer in New York. They had no title, registration, or power of attorney for the sale. They said that Joseph Santos in New York owned the vehicle. A collect telephone call was placed to Santos and "we had a hard time getting Mr. Santos to accept the phone call, since he, he didn't know anything about a '63 Cadillac." [R.T. 144-45].

However, after being advised that it was just a routine check, Santos

for resale Santos was informed that Lamenca would be cited for a tax violation, and the conversation terminated [R.T. 145-46].

Lamenca subsequently told Officer Benavidez that Santos was going to bring a girlfriend to California in two or three days and that that was the reason for the story about a resale. Another telephone call was placed to Santos, and Benavidez asked if he could speak or if his wife was probably on an extension. Santos said that he could speak, and was told about the girlfriend story, and replied that there was no girlfriend and that the car was coming to California for sale [R.T. 146-47].

The two telephone calls were made to a telephone registered in the name of Daisy Trujillo, the wife of appellant Santos [R.T. 145, 159, 178]. Officer Benavidez saw appellant Lamenca between approximately 2 p.m. and 4:50 p.m. on March 21 [R. T. 142, 144].

Records of the Hollywood Hills Motel in Hollywood showed that Mike Lamenca and "J. Islesia" registered there on March 22, 1965, having a Cadillac with New York license 212 JS, and that they were continuously registered there through April 8, 1965 [R.T. 151-53; Government Exhibit 20, Supplemental Transcript of Record].

On April 6, 1965, a telegram was sent from New York to Hollywood, California, addressed to Mike Lamenca at the Halls Motel. It read as follows:

"Come today.

Joe." [R.T. 159, 162-64].

The telegram had been charged to CA 1-8975, the Daisy Trujillo telephone

Hollywood from October 9, 1964, to October 13, 1964; October 21, 1964, to October 28, 1964; and January 29, 1965, to February 22, 1965. During the latter period he was registered with one "J. Perez." [R.T. 206, 208, 211, 213]. "J. Perez" appeared to be similar to Wilfredo Iglesias Perez, who was the "Mr. Iglesias" who was riding with appellant Lamenca in New Mexico on March 21, 1965. [R.T. 144, 147-48, 178, 208-09].

M. Lamenca at 206 60th Street, West New York, had a telephone from which a call was placed to Tijuana, Mexico, on May 4, 1965. Appellant Lamenca lived at 206 60th Street [R.T. 119, 168-69].

Appellant Meza-Bustamonte testified that he was innocent and had never seen appellants Lamenca and Santos before he was arrested; that on May 7, he received the vehicle in which he was later arrested; that the vehicle was delivered to him by two persons whose names he did not know; that they offered him a ride to Los Angeles if he would drive the vehicle across the border to San Diego; that the reason for these border-crossing procedures was the fact that he did not have immigration papers, although he had a document authorizing his entry into the United States; that they gave him no money; that one of them said that they had to meet another friend at the Greyhound Bus Depot at San Ysidro; and that he was going to meet the men in San Diego where the ferry goes to Coronado [R.T. 239-42, 244, 254-55, 285].

Meza-Bustamonte also testified that he "thought they probably had tequila or something unlawful to pass"; that he searched the vehicle and

that had been given to him by one "Antonio Lopez" for the purpose of betting upon the fights in Los Angeles; that the piece of paper with telephone number 6 2312 was given to him by a girl named "Maria Luisa"; and that he made no attempt to obtain "Antonio Lopez" and "Maria Luisa" as witnesses at the trial [R.T. 241, 243, 246, 248, 257, 292-93]. He also testified that the interrogating agent threatened to put him in jail for 50 years if he did not admit that another piece of paper was in his possession, and that Agent Gates made threats in connection with his inability to see his family again and told him to say that the \$100 was furnished by Santos [R.T. 266, 289].

Meza-Bustamonte denied under oath that the Patricio Becerra "Hailanderl Motel" slip had been in his possession; that the \$100 consisted of five twenty-dollar bills; and that he was nervous when he talked to Inspector Hanson [R.T. 243, 250, 255, 263]. He also denied that he had previously stated that he did not know where the telephone number (6 2312) came from or why he wrote it down; that he had stated that he was going to San Ysidro; that he had stated that a man named "Antonio" had given him the vehicle; and that he had stated that this "Antonio" came by his place of employment and offered him a ride to Los Angeles for \$3.50 [R.T. 249-251, 253, 290].

Agent Gates testified that Meza-Bustamonte had stated that the car in which he was riding at the time of his arrest was furnished to him by a man named "Antonio", that "Antonio" met him at Meza-Bustamonte's place of employment, and that he was to pay "Antonio" \$3.50 for the ride to Los

with a 50-year sentence, that he did not threaten the suspect in regard to seeing his family, and that he did not tell the suspect what to say [R.T. 331-33].

David Burnett testified that Meza-Bustamonte had stated that he obtained the automobile, in which he was riding when arrested, from one "Antonio," and that Agent Gates made no threats in regard to the suspect seeing his family or receiving a long prison sentence. He also testified that Agent Gates did not tell Meza-Bustamonte to say that he knew Santos [R.T. 343-45].

Inspector Hanson testified that Meza-Bustamonte stated that he did not know why he put the piece of paper (with the 6 2312 number) in his watch pocket and did not know what it meant [R.T. 360]. Hanson testified under cross-examination that Agent Maxcy told him that the number was a marihuana dealer's number [R.T. 362-63].

Additional testimony was received outside of the presence of the jury upon the question of revealing the informant. Agent Gates testified that he believed that the informant would be "done away with" if Patricio Becerra ascertained his identity, and that information had been received in connection with the Chrysler as well as the vehicle later driven by Santos. He testified that the informant told him that the Chrysler had been driven into a Tijuana garage belonging to Patricio Becerra, that Becerra entered the garage with several gunnysacks, that two men arrived in a Chevrolet which went into the garage, stayed there for about five minutes, and was taken out and parked upon the street, that the Chrysler went into the garage

immediately afterwards; and that the men from the Chevrolet stayed in the area. The Chevrolet was the same one in which Santos crossed the border just before his arrest [R.T. 299, 301-03].

Appellant Santos testified (outside of the presence of the jury) that he sold the Cadillac for \$4000 to "Patricio Becerra," who later turned out to be the nephew of Patricio Becerra; that Lamenca was to transport the vehicle to Los Angeles; that he went to Tijuana in order to talk to Becerra in connection with the registration of the vehicle; that he was in Tijuana on May 7, 1965; and that he went to talk to Becerra, parked nearby, went to get something to eat since Becerra was not there, returned, and found the vehicle parked at the same location [R.T. 313-14, 318-19]. He also testified that he was with Mike Lamenca in Tijuana and that he, Santos, had rented the Chevrolet [R.T. 313, 317].

The request for disclosure of the informant was denied. The trial Judge stated that the testimony of Santos was "pure fabrication" and added:

"From what Mr. Santos said, it is the most unbelievable story I believe that possibly he could have told us, and I just would not cause a dismissal of this case on the basis of what he claims."
[R.T. 320, 327-28].

Appellant Santos did not testify before the jury. Appellant Lamenca did not testify [R.T. 295, 329].

V

ARGUMENT

- A. FAILURE TO REQUIRE DISCLOSURE OF THE INFORMANT DID NOT CONSTITUTE ERROR.

disclosure of the informant constituted error.

Appellant Meza-Bustamonte made no request for disclosure of the informant, so he may not raise the issue in this appeal. An issue must be raised in a timely fashion in the trial court.

Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948), cert. denied, 334 U. S. 844 (1948)

While the remaining appellants rely upon the theory that the informant might possibly be a potential witness, it is evident that this was a matter of no importance to appellant Lamenca at the trial, because his counsel announced that he was "not going to introduce or present any evidence." [R.T. 295]. It was after this that counsel for appellant Santos made the request for disclosure of the informant. Appellant Lamenca joined in the request although he had already, in effect, rested his case [R.T. 296-97]. It is clear that the alleged error did not affect the substantial rights of appellant Lamenca and therefore should be disregarded under Rule 52(a) of the Federal Rules of Criminal Procedure.

Turning then to the question of the potential effect upon the defense of appellant Santos, it is readily apparent that he is pushing against the current of a long line of appellate decisions in Customs cases. This Court had repeatedly upheld denials of motions to require disclosure of informants in smuggling cases.

Smith v. United States, 9 F.2d 386, 387 (9th Cir. 1925);

Jones v. United States, 326 F.2d 124, 127, 129 (9th Cir. 1963), cert.

denied, 377 U.S. 956 (1964);

Hurst v. United States, 344 F. 2d 327, 328 (9th Cir. 1965);

Cook v. United States, 354 F.2d 529, 531 (9th Cir. 1965);

King v. United States, 348 F.2d 814, 819 (9th Cir. 1965), cert. denied,
382 U.S. 926 (1965);

Alexander v. United States, 362 F.2d 379, 383 (9th Cir. 1966);

Garibay-Garcia v. United States, 362 F.2d 509 (9th Cir. 1966);

Aguilar v. United States, 363 F.2d 379, 381 (9th Cir. 1966).

Appellants would seek to find an exception to the well-established rule merely because the informant observed a preliminary step in what appellants believe was the loading of the automobile involved in the smuggling. Appellant Santos refers to the necessity for disclosure in regard to his defense as an alleged principal and also as an aider and abettor, since it is asserted that the informant would be helpful in the defense of Meza-Bustamonte, and that Santos would not be guilty unless Meza-Bustamonte was guilty.

However, proof of guilt of Meza-Bustamonte was not essential in connection with the conspiracy conviction of Santos, as it would be sufficient to prove that Santos conspired with Miguel Lamenca or one of the "other persons to the Grand Jury unknown" (e.g., Patricio Becerra, or the person who sold the marihuana in Mexico). While the primary alleged overt act seemingly required an offense by Meza-Bustamonte, this was mere surplusage. Proof of an overt act is not required in a Title 21 conspiracy case.

Leyvas v. United States, 371 F.2d 714, 717 (9th Cir. 1967). Surplusage in an indictment "is innocuous and may be ignored."

While proof of Meza-Bustamonte's guilt under Count Two possibly would be essential in order to sustain the convictions of Santos and Lamenca for aiding, abetting, etc., under that count, it is not necessary to discuss that possibility, because the problem does not exist as to Count One (the conspiracy count), and concurrent sentences were imposed in the cases of Santos and Lamenca.

Where concurrent sentences are imposed, conviction upon a particular count is not subject to attack upon appeal if there is a valid conviction upon another count involving an equal penalty.

Lawn v. United States, 355 U. S. 339, 359, 362 (1958);

Fenton v. United States, 308 F. 2d 246 (9th Cir. 1962).

There is no reason to believe that the informant would be a helpful witness in the defense of appellant Santos. Indeed, all of the indications are to the contrary. Agent Gates testified that the informant told him that two men arrived at the garage in the Chevrolet, they took it into the garage, it stayed there for about five minutes, and it was taken out and parked; that the Chrysler went into the garage immediately afterwards; and that the men from the Chevrolet stayed in the area [R.T. 303].

This is inconsistent with the testimony of appellant Santos to the effect that he had rented the Chevrolet, went to the location with Lamenca, left the car on the street, went to eat, returned, and found the Chevrolet at the same location [R.T. 314, 317].

When the question of disclosure or non-disclosure of a confidential

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."

Roviaro v. United States, 353 U. S. 62 (1957).

The weight upon the non-disclosure side of the balance is readily appreciated. The United States Supreme Court recently considered a probable cause-informant privilege question and quoted with approval the statement that "we accept the premise that the informer is a vital part of society's defensive arsenal."

McCray v. Illinois, United States Supreme Court, March 20, 1967.

Other authorities have commented upon the vital importance of informants:

"Most of the large seizures of heroin, diamonds, gold, and other contraband have been discovered because someone gave advance information. Customs agents readily concede that most smuggling rings are broken up because of the tips that come from informers who often play a deadly and dangerous game."

"Border Guard", Don Whitehead, New York, 1963, p. 115

"The most important espionage case in American history was solved through the services of a paid informant of the FBI." J. Edgar Hoover, 58 Yale Law Journal 404.

"Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have

his life protected there won't be many informers hereafter."

(Emphasis added.)

United States v. Estep, 151 F. Supp. 668, 672-73 (N.D.Texas 1957).

In Estep, supra, the Court took judicial knowledge "of a number of informers that have appeared in his court who have been murdered or foully treated." These murders of Federal informants were accomplished by such means as stabbing, machine gun fire, drowning, throat-cutting, and head-smashing.

In Aquilar v. United States, supra, at p. 381, this Court upheld the denial of the motion to require disclosure of the informant in a border-crossing marihuana-smuggling case and noted that disclosure will sometimes "imperil the life of the informer in this dirty business."

What, then, are the weights upon the other side of the balance?

"Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Roviaro, supra, at p. 62.

The "possible defenses" that might be promoted by disclosure of the informant were lacking in substance. The defense appeared to be concerned with a trip by air from New York City to Los Angeles and an additional trip from Los Angeles to Tijuana, Mexico, all for the purpose of discussing registration upon an automobile. It is not surprising that the trial Judge, who was the trier of fact upon the issue, concluded that the tale related by

The "possible significance of the informer's testimony" includes the fact that in the doubtful event that he could be brought within the jurisdiction of the court, he presumably would testify that he observed the events provided in his account to Agent Gates. While there is no indication that any of this would be favorable to appellants, there is clear indication that some of it would be unfavorable. The statement to the effect that two men put the vehicle in the garage contradicts the version of appellant Santos. This indicates that Santos was committing perjury if the jury believes the theoretical witness. If the jury does not believe him, he does not assist the appellant's defense.

Consequently, appellant Santos has a much heavier burden than the defendant in Hurst, supra, at p. 328, where "mere hopeful guessing," a "'shot in the dark,'" was not a sufficient basis for a requirement that the informant be revealed. Here, appellant Santos not only bases his argument upon hopeful speculation that the informant will say something new that will assist him, but he also must hopefully guess that the informant will repudiate and retract one of his statements to Agent Gates [R.T. 326] .

An evidentiary privilege involving "a vital part of society's defensive
4
arsenal," should not be cast aside upon such frail and unsupported speculation.

disclosure of the informer's identity to the appellant would have been relevant or helpful or essential to appellant for a fair trial."

Appellants also contend that error occurred when the trial Court mentioned the fact (outside of the presence of the jury) that appellant Santos might testify.

Without conceding that this remark constituted error, it is sufficient to note that no harm resulted from the remark or from the testimony by Santos, so there is nothing of which to complain. Appellants did not list this particular point in their Specification of Errors [Appellants' Opening Brief, p. 5-a].

Appellants also complain that a Customs inspector stated that there was a "lookout" that might connect Santos and Meza-Bustamonte. This appeared to be a legitimate statement in response to a question by counsel for appellant Santos. However, it was stricken from the record [R.T. 364-65], and appellants do not list this point in their Specification of Errors.

B. STATEMENTS BY APPELLANT MEZA-BUSTAMONTE WERE
PROPERLY RECEIVED IN EVIDENCE.

Appellant Meza-Bustamonte complains that statements by him were received in evidence without a showing that he was advised of his legal rights in Spanish or English.

Since Meza-Bustamonte made no objection in the trial Court in regard to this matter [R.T. 330-33, 343-45], he may not raise the issue in this appeal. Issues must be raised in a timely fashion in the trial Court.

v. Arizona, 384 U.S. 436 (1966), is inapplicable.

Johnson v. New Jersey, 384 U. S. 719, 734 (1966).

Furthermore, this appellant was advised of his legal rights (except for the Miranda warning). The conversation was in Spanish [R.T. 331].

C. STATEMENTS BY APPELLANT LAMENCA WERE PROPERLY
RECEIVED IN EVIDENCE.

Appellant Lamenca contends that there was no showing that he intelligently waived the right to counsel when he made certain statements upon July 22, 1965.

Appellant Lamenca was advised of his legal rights, including the right to counsel, on July 22 [R.T. 111]. He also had been advised of his rights on May 7, 1965 [R.T. 89-90]. The specific requirements of the subsequent Miranda decision were not satisfied and are not relevant here.

Lamenca understood English but was not proficient at speaking in the English language. Investigator Rainsberger stated:

"He spoke quite well. We had no difficulty during approximately two hours of our conversation." [R.T. 31, 90-91].

The fact that Lamenca had an interpreter at the trial is immaterial. He may not create "evidence" by requesting an interpreter.

The statements of July 22 were quite innocuous, as similar statements had been made to Investigator Rainsberger on May 7, 1965, and these were received in evidence without objection by appellant Lamenca [R.T. 89-91]. The July 22 statements involved admissions by Lamenca that he had been

Tijuana before; that Santos paid the fare on the May 1965 flight; and that the \$4000 or \$4500 belonged to Santos [R.T. 111-12]. The statements concerning Santos were similar to those made in the May 7th interview [R.T. 91]. The statements regarding trips to California were unimportant, in view of the fact that motel records and the testimony of Officer Benavidez provided the same evidence. Consequently, assuming arguendo that there was error here, it is respectfully submitted that it was harmless error.

D. STATEMENTS BY APPELLANT SANTOS WERE PROPERLY
RECEIVED IN EVIDENCE.

Appellant Santos contends that statements made by him without the presence of his counsel were improperly received in evidence. He refers to the statements made to Agent Murphy on May 18, 1965.

Previously, on May 7, 1965, Agent Gates advised Santos concerning his legal rights, including the right to an attorney [R.T. 72]. On May 18, Agent Murphy went to see Santos for the purposes of obtaining information concerning a Volkswagen that was under seizure and obtaining the New York registration form for the Volkswagen [R.T. 10, 108].

After Santos stated that the agents in San Diego had the registration, Agent Murphy said, "Okay, that's what I was after," and started to leave. Santos followed Murphy to the door and began to talk about the Cadillac. Murphy asked Santos whether he had an attorney and Santos replied that he had one in San Diego. Murphy asked him if he had a lawyer in New York. Santos replied in the negative and said that "he didn't think it was necessary."

Murphy stated that it would be right for Santos to get a lawyer in New York, and Santos continued to talk about the Cadillac. Murphy warned him that anything that he said regarding the Cadillac could be used against him. Santos continued to talk about the Cadillac [R.T. 11].

It would be difficult to find a clearer case of a free and voluntary waiver of the right to counsel.

Appellant Santos was not greatly concerned about this issue during the trial. Before the Government's opening statement, counsel for the Government suggested that there might be a dispute concerning the question of waiver of the right to an attorney, and counsel for appellant Santos briefly noted that there would be an objection upon the ground that the defendant was not advised of his legal rights. However, he emphasized a corpus delicti objection in his comments to the Court [R.T. 12-15] .

When the evidence of the conversation was offered during the trial, the following objections occurred:

5
"MR. CASTRO: Just for the record I would renew my objection.

6
"MR. SHEELA: Also for the record I renew the corpus delicti objection, your Honor.

"THE COURT: That is overruled."

[R.T. 108].

By renewing one objection without renewing the other, counsel implicitly abandoned the latter objection. Assuming arguendo that he did not abandon

ing his legal rights), the objection was not good. Santos was advised concerning his legal rights before he made any significant statements [R.T.11], and he had previously been advised of his legal rights on May 7 as well [R.T.72].

Appellants also note that appellant Santos spoke Spanish and had an interpreter at trial. He apparently did not need the interpreter, because he answered questions in English from the witness stand until his counsel stopped him from doing so [R.T.312]. Agent Murphy testified that Santos "speaks good English." He added: "He speaks as well as I do." [R.T.29]

Appellants imply that Agent Murphy wrongfully visited Santos with the intention of interrogating him in the absence of his counsel, rather than for the purpose of checking upon the Volkswagen registration. However, Murphy testified that the purpose was to obtain the Volkswagen registration [R.T. 108]. He also testified that he had called Mrs. Santos upon one occasion and asked her for the registration [R.T. 128].

Considering the rule that evidence upon appeal is viewed in the light
7
most favorable to the prevailing party in the trial court, it is evident that an improper purpose cannot be inferred from the mere fact that Murphy asked one or more questions [R.T.134] after Santos had already waived the right to counsel.

Appellants cite Crooker v. California 357 U.S.433 (1958); Spano v. New York, 360 U.S.315 (1959); Massiah v. United States, 377 U.S.201 (1964; and Escobedo v. Illinois, 378 U.S.478 (1964).

Miranda, supra, p. 479, n. 48.

Spano and Escobedo both involved refusals of requests by suspects who wished to have the assistance of counsel. The suspects were in custody in both cases. Spano was concerned with the question of voluntariness of the statement, an issue not involved in the instant appeal.

In Massiah the suspect did not waive his right to counsel because he did not even know that he was being interrogated.

Appellant Santos was not in custody, was not denied the right to assistance of counsel, and was not secretly interrogated. He voluntarily waived the right to counsel.

E. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION
OF APPELLANT SANTOS.

It is respectfully submitted that the evidence was sufficient to sustain the conviction of appellant Santos. He crossed the border at the scene of Meza-Bustamonte's entry, about 30 minutes after Meza-Bustamonte crossed with marihuana worth approximately \$1425 in Mexico [R.T. 47-48, 50, 59, 70, 215].

Appellant Santos was "rather nervous." [R.T. 59-60]. A license plate receipt was under the floor mat of the vehicle operated by Santos. It showed a transfer of ownership of a 1963 Cadillac from Joseph Santos to Patricio Becerra [R.T. 64-65; Government Exhibit 7, Supplemental Transcript of Record]. Meza-Bustamonte's billfold contained a sales slip with the purchaser listed as Patricio Becerra. The reverse side of this paper contained the

Highlander Motel 126 ("Hailander!") notation. Santos had the key to Room 126 at the Highlander Motel (Motor Hotel). [R.T. 56-57, 71; Government Exhibits 4, 9, Supplemental Transcript of Record].

Santos had a card containing the number, "DU 6-2312," in hand-printing on the reverse side. Meza-Bustamonte had the number, "6-2312," on a piece of green newspaper material in his watch pocket [R.T. 52-53, 71-72; Government Exhibit 10, Supplemental Transcript of Record] .

"DU" was the prefix used for Tijuana telephone numbers [R.T. 75]. Santos admitted that he had obtained the 6-2312 telephone number in Tijuana, and Meza-Bustamonte testified that his 6-2312 number was a Tijuana telephone number [R.T. 74, 269-70].

When Santos was informed by Agent Gates that Meza-Bustamonte had the same telephone number and the Highlander Motel 126 notation, Santos made the very damaging admission:

"The damage is done now." [R.T. 74-75].

Santos admitted that Lamenca had come with him from New York to Los Angeles and then to Tijuana [R.T. 74]. Lamenca was found in the Highlander Motel room on the same evening. He had \$4500 in his possession [R.T. 89-90, 92]. These facts indicate the existence of a joint criminal venture of the nature found in Eason v. United States, 281 F.2d 818 (9th Cir. 1960).

When interviewed by officers, Santos made some statements which were patently absurd and others which were directly contradicted by evidence viewed in the light most favorable to the Government, and therefore constituting falsehoods tending to show consciousness of guilt.

The absurd statements involved his claim that he made the entire trip by air from New York City to Los Angeles and an additional trip to Tijuana merely for the purpose of recovering license plates upon a vehicle that he had sold in New York City [R.T. 73-75].

The false statements included the statement that he flew from New York by himself (contradicted by his later statement); the statement that he drove to Tijuana by himself (contradicted by his later statement); the statement that he came to the West Coast "to see the country" (contradicted by his later statement); the statement that a Mexican purchased the Cadillac in New York City on March 22 and drove away (contradicted by the fact that the Cadillac was westbound in New Mexico on March 21); the statement that he had never been to California before May 1965 (contradicted by airline records and Diners' Club records); the statement on the telephone to the effect that he did not know anything about a 1963 Cadillac; and the statement by telephone that the vehicle was coming to California for resale [R.T. 73-75, 109-10, 142-43, 145-46, 174-75, 201-03].

While the facts of each conspiracy case are unique, there are some definite similarities between the evidence herein and the facts involved in Curtis v. United States, 297 F. 2d 639 (5th Cir. 1961), cert. denied 369 U.S. 838 (1962), and Meyers v. United States, 310 F. 2d 801 (5th Cir. 1962).

In Curtis, supra, and in Meyers, supra, as in the instant case, the defendant in question did not enter the United States with the marihuana. In each case, the evidence was circumstantial. In Curtis, the evidence against appellant Athens primarily involved his connection with the smuggler on her trip to Mexico, as well as his false statements and use of an alias.

This conviction was affirmed.

In Meyers, the defendant walked across the border about 1 hour and 45 minutes after his wife drove into the United States with a load of marihuana. The other evidence against him involved his possession of some gloves and cologne, scratches upon his arms, the small amount of money in possession of his wife, and the fact that he shared a Mexican hotel room with her up to four days before the smuggling incident occurred. His conviction was affirmed:

"We think the circumstances taken together as a whole completely foreclose any other conclusion than that the wife and husband had made what they thought was a shrewd plan to have her smuggle the stuff in and, after it had been safely smuggled in, the defendant was to rejoin her in Laredo." (at p. 802).

F. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION
OF APPELLANT LAMENCA.

Appellant Lamenca contends that the evidence was insufficient to sustain his conviction. Since the existence of a conspiracy involving Meza-Bustamonte and others was shown, the question is whether the Government satisfied the "slight evidence" test. Once the existence of a conspiracy is shown, "slight evidence is all that is required to connect the defendant with the conspiracy."

Diaz-Rosendo v. United States, 357 F. 2d 124, 130 (9th Cir. 1966), cert. denied, 385 U. S. 856 (1966);

Sabari v. United States, 333 F.2d 1019, 1021 (9th Cir. 1964).

In view of the fact that appellant Lamenca was the employee of appellant Santos [R.T.91], the nature of the business becomes significant in view of the following chronology of events:

October 9, 1964 - October 13, 1964 - Lamenca in Hollywood, California.

October 21, 1964 - October 28, 1964 - Lamenca in Hollywood.

December 9, 1964 - Date of New York - Los Angeles flight billed to Santos.

January 29, 1965 - February 22, 1965 - Lamenca in Hollywood, living with "J. Perez" (i.e., Wilfredo Perez).

March 21, 1965 - Lamenca and "Iglesias" (i.e., Perez) driving Santos Cadillac westward in New Mexico.

March 22, 1965 - April 8, 1965 - Lamenca registered in Hollywood motel with "Islesia."

April 6, 1965 - Santos sends Lamenca trans-continental telegram: "Come today. Joe."

May 4, 1965 - Call from Lamenca telephone in West New York to Tijuana, Mexico.

May 6, 1965 - Lamenca flies to West Coast from New York, admittedly with Santos at expense of Santos.

May 7, 1965 - Santos and Meza-Bustamonte arrested at San Ysidro. Lamenca in motel with \$4500, states that it belongs to Santos.

Lamenca was a resident of New York or New Jersey throughout this entire period [R.T.119-20,139-41]. Since Santos was ostensibly engaged in the bakery business [R.T.214], it is evident that his employee, Lamenca,

didn't have much time for baking during his constant travels between the East Coast and the West Coast.

The natural inferences from the evidence lead to the conclusion that Lamenca drove the Cadillac to the West Coast for the purpose of transporting the large load of marihuana back to New York after a rendezvous with Meza-Bustamonte at the Highlander Motel; that Santos left the Cadillac with Becerra as security for payment of the marihuana after delivery, for which purpose Lamenca had \$4500 in cash (probably having anticipated a larger delivery); that Santos kept the Cadillac receipt as security for the return of the Cadillac by Becerra but hid it under the floor mat in order to avoid any suspicion by officers, who might be aware of Becerra's occupation as a peddler; that Meza-Bustamonte had the telephone number so he could call the Tijuana conspirators in case something went wrong; that Santos had the same telephone number for the same reason; and that Santos claimed to know nothing about the Cadillac at the time of the New Mexico telephone conversation because he knew that the Cadillac and Lamenca were involved in a major criminal conspiracy.

The jury also could reasonably consider consciousness of guilt to be the motive for Lamenca's various false statements, including the statement that he had gone to see a movie that day but did not remember what it was about; the false address; and the false statement to Officer Benavidez on March 21 regarding the girl friend of Santos. [R.T.91, 106, 139-40, 146] .

Appellant Lamenca argues that the officers did not arrest him and also argues that Meza-Bustamonte claimed that he did not know Lamenca. The failure of the officers to arrest Lamenca would not be important, even if it

be assumed that all of the evidence was before them on that occasion. Meza-Bustamonte's testimony, repeatedly impeached and obviously rejected by the jury, provides small support for Lamenca's position.

In view of the decision of this Court in Eason, supra, and the decision of the Fifth Circuit in the case of appellant Athens in Curtis, supra, it is respectfully submitted that the jury correctly decided the issue of appellant Lamenca's guilt or innocence.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

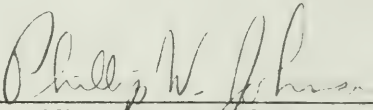
EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

UNITED STATES OF AMERICA,

Appellee.

Nos. 21044-5-6

Appeal From the United States District Court
For the Southern District of California

APPELLANT'S REPLY BRIEF

FILED

MAY 11 1967

WM. B. LUCK, CLERK

SHEELA, O'LAUGHLIN, HUGHES & CASTRO
By: Barton C. Sheela, Jr. and
Ramon Castro
Suite 1101 U. S. Grant Hotel
San Diego, California 92101

(714) 233-8858

Attorneys for Appellants

1967

INDEX

	Page
TABLE OF AUTHORITIES	ii
I. REPLY BRIEF.	1
II. CONCLUSION.	3
CERTIFICATE.	4

TABLE OF AUTHORITIES

Page

CASES

People v. McShann, 50 Cal. 2d 802; P.2d 330 (1958). . .	2
Roviaro v. United States, 352 U.S. 53, pp. 60, 61 (1956).	2

1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT

3 MIGUEL LAMENCA,
4 JOSEPH SANTOS,
5 PEDRO MEZA BUSTAMONTE,

6 Appellants,

7 v.

8 UNITED STATES OF AMERICA,

9 Appellee.

Nos. 21044-5-6

10 Appeal From the United States District Court
11 For the Southern District of California

12 APPELLANT'S REPLY BRIEF

13 I. Appellants respectfully reiterates and invites the
14 court's attention to arguments raised in their opening brief
15 on behalf of all appellants on the issues of the sufficiency
16 of the evidence and the admission of extra judicial statements.

17 II. The trial court should have ordered the disclosure of
18 the identity of the informant.

19 The government's brief on this issue in substance is
20 that the trial court was correct because one, appellants could
21 not with certainty show what the informant's testimony would
22 be, and two, that even if the informant's identity should have
23 been revealed it was not prejudicial error because the acquittal
24 of MEZA-BUSTAMONTE would only void the conviction of co-appel-
25 lants in the substantive count and that the conspiracy
26 conviction would not fail as a matter of law.

1 (a) As to the first, appellants state that it would
2 be impossible for a defendant to state with certainty what an
3 eyewitness's testimony would be where the very existence of
4 such an eyewitness was unknown to the defendant until the
5 trial was almost completed. Because of the limited nature of
6 the Federal Discovery Rules in existence at the time of this
7 trial there was no way for appellants to have known of his
8 existence until the trial had commenced.

9 (b) As to the second contention, simple logic and
10 common sense would compel the belief that if the eyewitness
11 identified the people who drove the Chrysler automobile as the
12 persons described by appellant MEZA-BUSTAMONTE and corroborated
13 the testimony of appellant SANTOS in any detail, acquittals of
14 all the appellants were substantially probable.

15 It is respectfully submitted that the test to be
16 applied is not whether the prosecution will dismiss a case
17 rather than comply with an order to identify the informant but
18 rather the test is could the eye-witness's testimony be helpful
19 to the defense. (R.T., p. 310-311; Roviaro v. United States,
20 352 U.S. 53 (1956), People v. McShann, 50 Cal. 2d 802; P.2d
21 330 (1958).)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the District Court must be reversed.

Respectfully submitted:

SHEELA, O'LAUGHLIN, HUGHES & CASTRO

By

Barton C. Sheela, Jr., Attorneys
for Appellant Santos


SHEELA, O'LAUGHLIN, HUGHES & CASTRO

By

Ramon Castro, Attorneys for
Appellants Lamenca and Meza-Bustamonte

CERTIFICATE

We, Barton C. Sheela, Jr., and Ramon Castro, certify, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in our opinion, the foregoing brief is in full compliance with those rules.


Barton C. Sheela, Jr.


Ramon Castro

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss

SANDRA J. WILKES, being first duly sworn, deposes
and says:

That she is a citizen of the United States and a
resident of San Diego County, California; that her business
address is 1101 U. S. Grant Hotel, San Diego, California;
that she is over the age of eighteen years, and not a party
to the within action.

That on May 12th, 1967, she deposited in the
United States mail, San Diego, California, in the within
action, Nos. 21044-5-6 MIGUEL LAMENCA, JOSEPH SANTOS, PEDRO
MEZA-BUSTAMONTE v. UNITED STATES OF AMERICA,
in an envelope bearing the requisite postage, a copy of

APPELLANT'S REPLY BRIEF

addressed to:

Edwin L. Miller, Jr.
United States Attorney
Southern District of California
332 United States Courthouse
325 West "F" Street
San Diego, California 92101

at which place there is a delivery service by United States
mails from said post office

Sandra J. Wilkes
Sandra J. Wilkes

SUBSCRIBED and SWORN to before me

this 12th day of May, 1967.

HELEN K. TEAGUE
My Commission Expires Jan. 30, 1970

HELEN K. TEAGUE
NOTARY PUBLIC
Principal Office, San Diego Co. Calif.

Helen K. Teague
Notary Public in and for said State and County

No. 21047 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.*,

Appellees.

Appeal From Judgment of Dismissal After Order
Granting Motion for Summary Judgment.

BRIEF OF APPELLANT, JAMES
W. CORRINGTON.

LIONEL RICHMAN,

LEWIS GARRETT,

HERBERT M. ANSELL,

1336 Wilshire Boulevard,
Los Angeles, California 90017,

Attorneys for Appellant.

FILED

DEC 5 1965

WM. B. LUCK, CLERK

TOPICAL INDEX

	Page
Jurisdiction	1
Statement of the Case	2
I.	
The Court's Findings of Fact	2
II.	
Statement of the Evidence	3
Statement of Question To Be Reviewed	6
Argument	6
The Finding That Appellant Was Guilty of Laches Is Contrary to Both the Evidence and the Law	6
Conclusion	10

TABLE OF AUTHORITES CITED

Cases	Page
Arant v. Lane, 249 U.S. 367	9
Chappelle v. Sharpe, 301 F. 2d 506	9
Duncan v. Summerfield, 251 F. 2d 896	8
Morse v. United States, 59 Ct. Cl. 139	9
Nicholas v. United States, 257 U.S. 71	8
Norris v. United States, 257 U.S. 77	8
United States v. Wickersham, 201 U.S. 390	9

Statutes

United States Code, Title 5, Sec. 863	1
United States Code, Title, 5, Sec. 1009	1
United States Code, Title 28, Sec. 1331	1
United States Code, Title 28, Sec. 1332	1
United States Code, Title 28, Sec. 1361	2
United States Code, Title 28, Sec. 2201	1
United States Code, Title 28, Sec. 2202	1
United States Constitution, Fifth Amendment	1
United States Constitution, Sixth Amendment	1

No. 21047

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.*,

Appellees.

**BRIEF OF APPELLANT, JAMES
W. CORRINGTON.**

JURISDICTION.

This case is before the Court upon an appeal from a judgment of the United States District Court, Southern District of California, Central Division, following the granting of a motion for summary judgment in favor of the Appellee.

The action in the Court below was brought by Appellant for a declaratory judgment and other equitable relief to restore him to employment with the National Aeronautics and Space Administration of the United States, and jurisdiction in the Court below was invoked pursuant to Sections 1331, 1332, 2201, and 2202, of Title 28, United States Code; Section 1009 of Title 5 of the United States Code, and upon the Fifth and Sixth Amendments to the Constitution of the United States. Appellant further invoked the Veterans Preference Act of 1944, as amended, Section 863 of Title 5 of the United States Code.

STATEMENT OF THE CASE.

I.

The Court's Findings of Fact.

The Court found, in substance, that Appellant had been engaged as an experimental jet aircraft mechanic by the National Aeronautics and Space Administration of the United States. On March 12, 1962, he was removed from this position by direction of the personnel officer, National Aeronautics and Space Administration, Edwards Air Force Base, California. He was notified by letter dated October 1, 1962, from the Board of Appeals and Review of the Civil Service Commission that his removal from his employment had been upheld. Following this letter, no further administrative remedies were available to the Appellant. After his removal became final, Appellant sought the advice of an attorney. His action in the Court below was not filed until August 13, 1965, more than 34 months after the plaintiff's removal became final.*

The Court drew as its Conclusion of Law that it had jurisdiction to review the administrative proceedings pursuant to 28 U.S.C. Section 1361 and that by not filing his complaint for review of the administrative proceeding for a period of 34 months after notification of the final decision of the Board of Appeals and Review, Appellant was estopped as a matter of law by his laches from claiming the relief sought.

*The Findings of Fact and Conclusions of Law [Tr. p. 186] indicate in Finding No. III that the letter of notification dated October 1, 1962, represented the end of the administrative process. Finding No. IV states that after his removal became final on October 1, 1963, the plaintiff sought the advice of an attorney. The use of date "1963" rather than "1962" is stenographic error and conceded by Appellant.

II.

Statement of the Evidence.

Plaintiff, a veteran of World War I, was employed by the National Aeronautics and Space Administration as a Jet Aircraft Mechanic, WB 10, at Edwards Airforce Base in California, until his removal on March 12, 1962 [Tr. p. 3].

On February 8, 1962, N.A.S.A. instituted removal proceedings against Appellant, charging him with deficiency in performance of duties, actions causing or tending to cause damage to federal property, actions endangering the safety of others and negligence [Tr. pp. 10-12].

Appellant duly denied the charges in some detail [Tr. pp. 13-17]. However, he was advised on March 5, 1962, that a final decision had been made to remove him [Tr. pp. 18-19].

This determination was promptly appealed to the Director, Twelfth U.S. Civil Service Region, San Francisco, on March 17, 1962, and a hearing requested [Tr. p. 20].

Upon receiving notice of hearing, appellant designated a fellow employee as his hearing representative. He also furnished respondent with a list of his proposed witnesses. However, on April 20, 1962, respondent advised appellant that he would be limited to five witnesses only [Tr. p. 22].

On April 22, 1962, appellant designated 5 witnesses whom he desired. However, feeling that these witnesses did not sufficiently rebut all of the named charges against him, on May 1, 1962, he submitted an additional designation of witnesses [Tr. pp. 23-24].

STATEMENT OF QUESTION TO BE REVIEWED.

Did the trial court err in holding that Appellant was guilty of laches as a matter of law in delaying the filing of his action to review the administrative finding?

ARGUMENT.

The Finding That Appellant Was Guilty of Laches Is Contrary to Both the Evidence and the Law.

Appellant's affidavit filed in opposition to the motion for summary judgment appears at pages 180 and 181 of the Transcript of Record. This affidavit was uncontradicted.

The affidavit indicates that Appellant did all of those things which a reasonable and prudent layman would do to protect his rights under law. He proceeded as diligently as a layman could be expected to proceed.

In his proceedings before the Civil Service Commission he was represented by a fellow employee, one whom, we may assume, was unaware of the necessary legal action to be taken to review a decision of the Civil Service Commission.

Immediately upon receiving the decision of the Commission, he consulted an attorney in Lancaster, California. That Attorney agreed to represent appellant in obtaining a vindication of his rights. It is true, and the affidavit has been scrupulous in setting forth the conversation which the appellant had with the attorney, that what the attorney said was that he would

“look into the matter to determine what my legal rights were insofar as appealing the decision of the Civil Service Commission.” That attorney had never had a similar type of problem in the past.

The local attorney, behaving as a reasonable and prudent general practitioner would be expected to behave, decided to obtain the services of a specialist in the field. He sought assistance in locating a law firm in the District of Columbia specializing in actions of this type.

He was furnished the name of such a law firm and transmitted the file to them. Then, the local practitioner became a Judge in the Municipal Court, and the problem of communication from Appellant to his local attorney to his Washington, D.C. attorney became compounded. It was not until June of 1965 that he first discovered that no action had been filed and immediately upon receiving that advice, he consulted other counsel who filed the instant act on one month later.

In selecting the United States District Court as his forum, rather than the Court of Claims, appellant consciously waived any claim to back wages in excess of the jurisdiction of the United States District Court, since he recognized the extent of the delay which had occurred and desired to do equity, as he sought equity.

In considering the equities here presented, the language of the United States Court of Appeals, reversing a judgment of the trial court barring relief on the ground of laches, is peculiarly appropriate. An action had been brought by a postal employee 32 months after

his discharge had become final. The trial court, applying a *per se* standard, held the action barred by the doctrine of laches. The Court of appeals reversed saying:

“In suit for reinstatement in government employment, as in equitable actions generally, laches has two elements, (1) unreasonable delay in prosecuting a claim and (2) resulting prejudice. *Gurley v. Wilson*, 99 U.S.A.P.P.D.C. 336, 239 F 2d 975. In the present case the second element is not clearly present, and the first element is absent.”

Duncan v. Summerfield, 251 F. 2d 896, 897.

There is no showing of prejudice in the record and certainly the evidence would negative “unreasonable” delay in prosecuting the claim.

The cases which were cited by the appellee in the Court below all have within them these two elements.

Nicholas v. United States, 257 U.S. 7 involved an action brought three years after removal from office, but with no objection to the removal having been made prior to suit.

Norris v. United States, 257 U.S. 77 involved an action brought eleven months after removal from office, the Court stating “. . . but no fact is found explaining his failure to assert his right to the office, or its emoluments, for the period of eleven months and a little over.” (page 80). In addition, the Court noted that the office had been abolished in the interim.

Arant v. Lanc, 249 U.S. 367, 371-372 involved a discharge without the bringing of formal charges and a delay of twenty months prior to the filing of the action. The Court stated that the delay, when *unexplained*, results in application of the doctrine of laches.

United States v. Wickersham, 201 U.S. 390 also involved a wrongful discharge without the bringing of charges. Two months later the employee demanded his salary but did not bring suit for four and a half years without explaining his delay.

Chappelle v. Sharpe, 301 F. 2d 506, 507 involved a delay of 34½ months before the bringing of the action. The Court noted, "the defendant officials moved to dismiss, filing in support an affidavit reciting facts which upon their face, pose the problem of laches." In this case, no problem of laches has been posed by the record.

Morse v. United States, 59 Ct. Cl. 139, involved the delay of over thirteen months before the filing of a petition with the only reason for the delay being that Appellant had "experienced much uneasiness over the possibility of his reinstatement in the service and his immediate removal therefrom in accordance with the Civil Service law." In the absence of any explanation of the delay, the petition was dismissed.

Conclusion.

Considering the work classification of appellant, it is obvious that there could be no showing of prejudice to appellee except insofar as the question of back pay is concerned. Appellant has from the outset stipulated to an equitable remittitur of any portion of the back wages found to be attributable to delay. Appellant's delay is not only not unreasonable but represented the best efforts by a layman to seek relief as expeditiously as a layman can obtain it. For the reasons stated, it is respectfully submitted that the judgment of the trial court should be reversed.

Respectfully submitted,

LIONEL RICHMAN,

LEWIS GARRETT,

HERBERT M. ANSELL,

By LIONEL RICHMAN,

Attorneys for Appellant.

Dated: December 2, 1966.

Certificate.

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the instant brief conforms to all requirements therein set forth.

LIONEL RICHMAN

N O. 2 1 0 4 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., et al.,

Appellees.

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
FREDERICK M. BROSIO, JR.,
Assistant U. S. Attorney,
Chief, Civil Division,
LARRY L. DIER,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellees.

FILED

FEB 7 1967

WM E. LOCK, CLERK

N O. 2 1 0 4 7
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., et al.,

Appellees.

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
FREDERICK M. BROSIO, JR.,
Assistant U. S. Attorney,
Chief, Civil Division,
LARRY L. DIER,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellees.

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
JURISDICTION	1
STATEMENT OF THE CASE	2
REGULATIONS INVOLVED	3
ISSUES PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I REVIEW OF THE TRIAL COURT'S APPLICATION OF THE DOCTRINE OF LACHES IS LIMITED TO DETERMINING WHETHER THERE WAS AN ABUSE OF DISCRETION.	6
II EVEN IF THIS COURT WERE TO REVIEW THE APPLICATION OF THE DOCTRINE OF LACHES ON ITS MERITS, THE TRIAL COURT'S JUDG- MENT MUST BE SUSTAINED.	7
III IT IS A FAMILIAR CONCEPT THAT ON REVIEW A JUDGMENT WILL BE AFFIRMED EVEN IF THE JUDGMENT IS GIVEN FOR THE WRONG REASONS. THEREFORE, THE JUDGMENT OF THE TRIAL COURT IN THIS CASE SHOULD BE AFFIRMED, ABSENT ANY CONSIDERATION OF THE DOCTRINE OF LACHES, BECAUSE THE APPELLEES ARE ENTITLED TO JUDGMENT AGAINST THE APPELLANT BASED ON THEIR MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE ADMINISTRATIVE PRO- CEEDINGS HAD PRIOR TO THE REMOVAL OF THE APPELLANT DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS AND WERE IN SUB- STANTIAL COMPLIANCE WITH THE ADMINISTRA- TIVE REGULATIONS AND PROCEEDINGS GOVERN- ING DISMISSALS. THE RECORD OF THE ADMINI- STRATIVE PROCEEDINGS IS BEFORE THIS COURT AS EXHIBITS "A" THROUGH "L" OF THE PLAINTIFF'S COMPLAINT [Tr. pp. 10-45].	10
SUMMARY	13
CERTIFICATE	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Brown v. Allen, 344 U.S. 443 (1952)	11
Chappelle v. Sharp, 301 F.2d 507 (C.A. D.C. 1961)	9, 10
Ellis v. Mueller, 280 F.2d 722 (C.A. D.C. 1960), cert.den. , 364 U.S. 883	12
Helvering v. Gowran, 302 U.S. 238 (1937)	11
Jones v. Summerfield, 265 F.2d 124 (C.A. D.C. 1959)	8, 9, 10
Laursen v. O'Brien, 90 F.2d 792 (C.A. 7, 1937)	6
McTiernan v. Day, 225 F.Supp. 720 (D.C. E.D. N.Y. 1964), aff'd. 337 F.2d 31 (C.A. 2, 1964)	12
Philbrook v. Howard, 320 P.2d 609 (Cal. 1958)	7
Williams v. Marshall, 235 P.2d 372 (Cal. 1951)	7

Constitution

United States Constitution:

Fifth Amendment	12
Sixth Amendment	12

Statutes

Title 5, United States Code, §863	11
Title 28, United States Code, §1291	1
Title 28, United States Code, §1346(a)(2)	1
Title 28, United States Code, §1361	1, 11

	<u>Page</u>
Title 28, United States Code, §1651	1
<u>Regulations</u>	
Title 5, Code of Federal Regulations:	
§752.104	3, 11
§772.305	3
§772.307	4, 11
<u>Text</u>	
5 C. J. S. , Appeal and Review, §1583	6

N O. 2 1 0 4 7
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., et al.,

Appellees.

APPELLEES' BRIEF

JURISDICTION

Appellant brought this action in the United States District Court for the Southern District of California (now the Central District of California), seeking reinstatement to the Civil Service position from which he was removed and back pay. The District Court had jurisdiction under 28 U.S.C. §§ 1361 and 1651, but, insofar as the recovery of back pay was concerned, that jurisdiction was limited to \$10,000 by 28 U.S.C. § 1346(a)(2). The District Court granted the government's motion for summary judgment on the grounds of laches. The jurisdiction of this Court is based on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In March, 1962, the appellant was removed from his job as a mechanic in the National Aeronautics and Space Administration, Flight Research Center, Edwards Air Force Base, California, on charges of deficiency in performance of duties, actions causing or tending to cause damage to federal property, actions endangering the safety of others, and negligence. After the removal was reviewed by the Board of Appeals and Review, the dismissal was upheld and the appellant was notified by letter dated October 1, 1962 [Tr. p. 44].

This action was filed by the appellant on August 13, 1965 [Tr. p. 2]. The appellees filed their motion for summary judgment on November 5, 1965, asserting entitlement to summary judgment on ground of laches and on the grounds that the administrative proceedings were in substantial compliance with the administrative regulations governing such dismissals [Tr. pp. 54-64].

In granting summary judgment, the District Court held that the thirty-four month delay between final removal and the filing of a lawsuit to review that removal constituted laches [Tr. pp. 183, 184]. In reaching its decision, the court below considered the Affidavit which had been filed by the appellant and made Findings of Fact, and Conclusions of Law which reflect that consideration [Tr. pp. 185, 186].

REGULATIONS INVOLVED

The pertinent portions of the regulations governing removal are as follows:

Title 5 -- Code of Federal Regulations -

"§ 752.104 General standards.

"(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service.

""

"§ 772.305 Hearings.

"(a) Coverage. This section applies only to appeals under Subpart B of Part 752 of this chapter.

"(b) Right to a hearing. An appellant is entitled to a hearing before the office of the Commission having initial jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

"(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate

in the hearing. Both parties are entitled to produce witnesses but as the Commission is not authorized to subpoena witnesses the parties are required to make their own arrangements for the appearance of witnesses.

" "

"§ 772.307 Further appeal to the Board of Appeals and Review.

"(a) Right of further appeal. Both parties are entitled to appeal the decision on the initial appeal issued under § 772.306 to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C. An appeal to the Board of Appeals and Review shall be in writing, set forth the reasons for the appeal, and be filed with the Board within 7 days after receipt of the decision on the initial appeal. The Board may extend the time limit in this paragraph when a party shows that circumstances beyond the control of the party prevented the filing of the appeal within the time limit.

" "

ISSUES PRESENTED

I

What is the scope of review of the trial court's holding that appellant is barred by laches?

II

Does the doctrine of laches bar the appellant from seeking judicial review of his removal?

III

Are there independent grounds upon which the judgment of the trial court can be sustained?

SUMMARY OF ARGUMENT

I

Review of the trial court's application of the doctrine of laches is limited to determining whether there was an abuse of discretion.

II

Even if this Court were to review the application of the doctrine of laches on its merits, the trial court's judgment must be sustained.

III

It is a familiar concept that on review a judgment will be affirmed even if the judgment is given for the wrong reasons. Therefore, the judgment of the trial court in this case should be

affirmed, absent any consideration of the doctrine of laches, because the appellees are entitled to judgment against the appellant based on their motion for summary judgment, on the grounds that the administrative proceedings had prior to the removal of the appellant did not violate any of his constitutional rights and were in substantial compliance with the administrative regulations and proceedings governing dismissals. A partial record of the administrative proceedings is before this Court as Exhibits "A" through "L" of the plaintiff's Complaint [Tr. pp. 10-45].

ARGUMENT

I

REVIEW OF THE TRIAL COURT'S APPLICATION OF THE DOCTRINE OF LACHES IS LIMITED TO DETERMINING WHETHER THERE WAS AN ABUSE OF DISCRETION.

The appellees take the position that the application of the doctrine of laches by the trial court was within its sound discretion. The case of Laursen v. O'Brien, 90 F.2d 792, 795 (C. A. 7, 1937), cites 5 C. J. S. Appeal and Review § 1583 in support of this proposition. Since discretion of the trial court is involved, review by this Court should be limited to a decision that the trial court did not abuse its discretion.

The law governing the review of matters within the discretion of the trial court has been stated as follows:

"

"[6] The courts have frequently declared that there is no artificial rule as to the lapse of time will justify the application of the doctrine of laches. Each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal. *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, 705, 262 P. 730; *McDevitt v. Butte City Ranch*, 7 Cal. App.2d 252, 254, 46 P.2d 290. "

Williams v. Marshall, 235 P.2d 372, 378
(Cal. 1951).

This rule was followed, and quoted, in the more recent case of Philbrook v. Howard, 320 P.2d 609 (Cal. 1958). It cannot be said that the trial court abused its discretion in applying the doctrine of laches to bar the appellant.

II

EVEN IF THIS COURT WERE TO REVIEW
THE APPLICATION OF THE DOCTRINE OF
LACHES ON ITS MERITS, THE TRIAL COURT'S
JUDGMENT MUST BE SUSTAINED.

The appellees have cited numerous cases in their Memorandum of Points and Authorities filed in support of the motion for summary judgment [Tr. pp. 57-61], and will not repeat them all here. In discussing the applicability of laches, the appellant pointed

out that the doctrine has two parts. To be barred, the record must show that the plaintiff waited an unreasonable length of time before bringing his action and the record must show that there has been prejudice to the defendant. The appellant, on page 7 of his Opening Brief, seeks to meet the issue of prejudice to the government. He speaks of a conscious waiver of back wages to reduce the amount of prejudice to the appellees. Even if this statement were true, and the record indicates that the waiver was unconscious since the Complaint sought restoration of his former position with back pay [Tr. p. 8] and the question of waiver did not arise until the appellees pointed out in their memorandum in support of their motion for summary judgment that the jurisdiction of the District Court was limited to \$10,000 [Tr. p. 57], the prejudice to the appellees still exists. There is at least \$10,000 worth of prejudice, besides the prejudice caused by the inevitable disbursement of government personnel during the three year time lag between the removal and the institution of this action.

Two of the cases which we cited in support of our motion for summary judgment are particularly applicable to this case. The language used by the court in the case of Jones v. Summerfield, 265 F.2d 124 (C. A. D. C. 1959) shows that the facts of that case were markedly similar to the facts of this case.

"

"We think that plaintiff-appellant is barred by laches. His suit was not brought in a proper forum until thirty-three months elapsed after his discharge,

and some seventeen months after the decision in Cole v. Young. The letters to various administrative officials do not excuse his delay in bringing suit.

United States ex rel. Arant v. Lane, 1919, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650; Grasse v. Snyder, 1951, 89 U.S.App.D.C. 352, 192 F.2d 35; Bailey v. United States, 1959, Ct.Cl., 171 F.Supp. 281.

" "

Jones v. Summerfield, supra, p. 125.

The case of Chappelle v. Sharp, 301 F.2d 507 (C. A. D. C. 1961), also seems to be quite close factually to the present case. In that case it appeared that the Civil Service Commission raised the issue of laches by factual allegations in an affidavit supporting its motion to dismiss. In this case, the problem of laches was raised directly in the memorandum supporting the motion for summary judgment [Tr. pp. 61-62]. In the Chappelle case, the appellant delayed thirty-four and one-half months after final removal before filing his lawsuit. The trial court entered summary judgment and the District of Columbia Circuit Court held that:

" "

"The plaintiff's case was barred by laches.

The law on the point was established by United States ex rel. Arant v. Lane in 1919 and has consistently been applied by the federal courts in many cases since then. The judgment of the District Court is

Affirmed."

Chappelle v. Sharp, supra, p. 507.

There is no distinction between this case and the Chappelle v. Sharp case, supra, and the Jones v. Summerfield, case, supra. On the strength of these authorities, the granting of summary judgment by the trial court was a correct decision.

III

IT IS A FAMILIAR CONCEPT THAT ON REVIEW A JUDGMENT WILL BE AFFIRMED EVEN IF THE JUDGMENT IS GIVEN FOR THE WRONG REASONS. THEREFORE, THE JUDGMENT OF THE TRIAL COURT IN THIS CASE SHOULD BE AFFIRMED, ABSENT ANY CONSIDERATION OF THE DOCTRINE OF LACHES, BECAUSE THE APPELLEES ARE ENTITLED TO JUDGMENT AGAINST THE APPELLANT BASED ON THEIR MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE ADMINISTRATIVE PROCEEDINGS HAD PRIOR TO THE REMOVAL OF THE APPELLANT DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS AND WERE IN SUBSTANTIAL COMPLIANCE WITH THE ADMINISTRATIVE REGULATIONS AND PROCEEDINGS GOVERNING DISMISSALS. THE RECORD OF THE ADMINISTRATIVE PROCEEDINGS IS BEFORE THIS COURT AS EXHIBITS "A" THROUGH "L" OF THE PLAINTIFF'S COMPLAINT [TR. pp. 10-45].

The appellees' motion for summary judgment was based on the alternative grounds that the appellant was barred by his laches and that a review of the administrative record would show that the procedures followed were correct and that his removal by the Civil Service Commission was not arbitrary or capricious. This second

ground was argued to the trial court and considered by it. However, by an order entered after oral argument, the trial court determined to base its decision for summary judgment solely on the ground of laches [Tr. pp. 183-184]. It is a well settled doctrine that, should this Court have any concern about the applicability of laches, the judgment below should be affirmed where there is an independent basis for affirmation. In Helvering v. Gowran, 302 U.S. 238 (1937), the court put the rule in this language.

"

"In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. . . ."

Helvering v. Gowran, supra, p. 245.

That rule has found more recent expression in the case of Brown v. Allen, 344 U.S. 443, 459 (1952).

It is therefore appropriate to reconsider the appellees' arguments in support of their motion for summary judgment as they relate to the review of the administrative record. This argument is found on pages 57 through 61 of the transcript. The administrative review of a removal is provided for in 5 C.F.R. § 772.307. Judicial review is in the nature of mandamus under 28 U.S.C. § 1361.

Title 5 C.F.R. § 752.104 provides, pursuant to the Veterans Preference Act (5 U.S.C. § 863), that the appellant was entitled to certain procedural safeguards and could have been removed

from his Civil Service job only for such cause as would promote the efficiency of the service. We cited [Tr. p. 57] a number of cases where the phrase "such cause as will promote the efficiency of the service" was considered. In support of the motion for summary judgment, the appellees argued that the scope of review of an administrative discharge is narrow. The reviewing court will only determine whether or not the actions of the removing agency were arbitrary or capricious or whether they departed from the required standards of procedural due process. See Ellis v. Mueller, 280 F.2d 722 (C. A. D. C. 1960), cert. den., 364 U. S. 883, and the other authorities cited at page 4 of the appellees' Memorandum of Points and Authorities, page 58 of the transcript.

It would be unnecessarily repetitious to reargue all of the points made in our memorandum in support of the motion for summary judgment. It is sufficient, we feel, to restate our conclusion that the National Aeronautics and Space Administration and the Civil Service Commission were not required to produce the witnesses requested by the appellant. The record before the District Court showed that the appellant had not discharged the initial burden of attempting to secure the attendance of the witnesses himself. The case of McTiernan v. Day, 225 F. Supp. 720 (D. C. E. D. N. Y. 1964), affirmed 337 F.2d 31 (C. A. 2, 1964), requires a showing by the appellant that he made positive efforts to obtain the attendance of the witnesses which he sought.

There is no merit in the appellant's claim of Fifth and Sixth Amendment violations. These suggestions were answered on

pages 6 and 7 of the memorandum in support of summary judgment, pages 60 and 61 of the transcript, and have not been supported at all by the appellant. It is clear from a review of the transcript that the appellant was afforded the full protection of his rights in the administrative proceedings which resulted in his removal. For this reason, and independently of a consideration of the doctrine of laches, the judgment of the trial court was the correct one and it should be affirmed.

SUMMARY

The trial court granted the appellees' motion for summary judgment. The order granting summary judgment was based on the grounds that the appellant was barred by his laches in waiting 34 months after final removal until the filing of a lawsuit to review that removal. It is the appellees' position that application of the doctrine of laches is a matter within the sound discretion of the trial court and should not be disturbed in the absence of a showing of abuse. There is no such showing by the appellant. The record and the comparable reported cases show that the doctrine was correctly applied in this case. The appellant's delay was unreasonable and it prejudiced the appellees, at the least to the extent of \$10,000.

Aside from the doctrine of laches, there is an independent basis on which the judgment below is correct. Within the legitimate



scope of review of the administrative proceedings, the court below could only have concluded that there was no denial of due process and that the removal action was not arbitrary and capricious. Because the judgment affirming the appellant's removal was correct, it must be affirmed whether on the grounds of laches or otherwise.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

FREDERICK M. BROSIO, JR.,
Assistant U. S. Attorney,
Chief, Civil Division,

LARRY L. DIER,
Assistant U. S. Attorney,

Attorneys for Appellees.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Larry L. Dier

LARRY L. DIER,
Assistant U. S. Attorney

No. 21047

FEB 20 1967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.*

REPLY BRIEF OF APPELLANT,
JAMES W. CORRINGTON.

LIONEL RICHMAN,
LEWIS GARRETT,
HERBERT M. ANSELL,

1336 Wilshire Boulevard,
Los Angeles, Calif. 90017,

Attorneys for Appellant.

FILED

FEB 17 1967

WM. B. LUCK, CLERK

TOPICAL INDEX

	Page
Preliminary Statement	1
Appellant Was Deprived of Due Process of Law	2
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

Devine v. Campbell, 194 F. 2d 876	6
Greene v. McElroy, 360 U.S. 474	4
Service v. Dulles, 354 U.S. 363	3
United States ex rel. Accardi v. Shaughnessey, 347 U.S. 260	3
Vitarelli v. Seaton, 359 U.S. 535	3, 4
Williams v. Zuckert, 371 U.S. 531	4, 6

No. 21047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.*

REPLY BRIEF OF APPELLANT, JAMES W. CORRINGTON.

Preliminary Statement.

The Trial Court took great pains to make it clear that it was not passing upon the merits of the complaint, but was passing exclusively on the issue of laches. In directing the re-drafting of the Findings of Fact and Conclusions of Law, the Trial Court reiterated its position that it was not considering the merits.

However, the Plaintiff and Appellant agrees with Defendants and Respondents that with the entire file before the Court, it would not be inappropriate for your Honorable Court to rule upon the merits and, if the Court deemed the position of Plaintiff and Appellant to be well taken, to direct the Trial Court to grant Plaintiff's motion for judgment on the pleadings.

Appellant Was Deprived of Due Process of Law.

The admissions contained in the answer to the complaint are essentially admissions of all of the facts which are pleaded. The denials are merely denials of the legal effect of those facts.

The essence of the admissions are that plaintiff, a native-born citizen of the United States, and a veteran of World War II, entitled to Veterans Preference eligibility under the Veterans Preference Act of 1944, was an employee of the National Aeronautics & Space Administration. He had been so employed for a period of some twenty years.

On or about February 8, 1962, removal proceedings were commenced against Plaintiff alleging a series of incidents. Plaintiff selected a fellow employee to act as his representative at his hearing.

In preparation for his hearing plaintiff submitted to his employer a list of witnesses whom he desired to attend such hearing and testify on his behalf. He was informed that only five witnesses would be permitted to testify. He designated such five witnesses. Thereafter, he submitted an additional designation of witnesses whom he desired to appear. He also demanded that the aircraft log book be made available in rebuttal to the allegations contained in Incident No. 1. Both of these requests were refused. Thereafter, plaintiff was dismissed.

The instant proceeding involves what is no longer a novel principle of federal law. As far back as *United*

States ex rel. Accardi v. Shaughnessey, 347 U.S. 260, the United States Supreme Court made clear that regulations pertaining to the conduct of administrative hearings must be strictly complied with by the Government in order to avail the citizen of due process of law.

Thereafter, *Accardi* was applied by the Court in *Service v. Dulles*, 354 U.S. 363, in holding that the regulations relating to the loyalty and security of employees which covered the discharge of employees had to be strictly complied with by the Secretary of State.

These two earlier decisions were concerned primarily with the question of whether regulations for the conduct of administrative proceedings which were adopted by regulatory agencies or the exercise of discretionary authority become mandatory upon the Government once they had been adopted. The finding in each case was in the affirmative.

The Court relied to some degree upon these earlier decisions in approaching for the first time the question of the procedural rights of employees in resisting dismissal from federal employment. In considering the applicability of procedural due process the Court did, in 1959, indicate that the rules of procedure adopted by an administrative agency must guarantee to the employee procedural due process, including the right to appear in an orderly proceeding to present evidence and to confront witnesses called against him.

Vitarelli v. Seaton, 359 U.S. 535.

Following the *Vitarelli* decision at the same session of Court the majority stated:

“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right ‘to be confronted with the witnesses against him’. This Court has been zealous to protect these rights from erosion.”

Greene v. McElroy, 360 U.S. 474, 496-497.

Finally, the Court reached the position in which plaintiff stands in the instant case. In 1963, it considered the matter of *Williams v. Zuckert*. In its original decision which appears at 371 U.S. 531, the Writ of Certiorari was dismissed, holding that the *Vitarelli* issue had not been properly presented to the Court. The Court did note in its per curiam decision that:

“The request for production of the witnesses, made only at the hearing by petitioner’s counsel,

was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct examination or cross-examination, shall assume the initial burden of producing them.

Had petitioner discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own, failed, then, to give meaning to the language contained in the regulations affording the 'opportunity . . . for the cross-examination of witnesses,' the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available, and under the Air Force Control (*Vitarelli v. Seaton*, US *supra*) would so require."

Thereafter, a petition for rehearing was filed. On April 22, 1963, the judgment of the trial court was reversed with directions to the trial court to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses (372 U.S. 765).

The regulations provide that witnesses may not be subpoenaed for an appearance before the Civil Service Commission. The procedure is for the employee to submit the names of the witnesses who are under the control of the Government and request their attendance.

This was done in the instant case and without reason and without cause, was rejected. Considering the multiple nature of the incidents alleged, plaintiff's employer apparently rationed him to one witness per incident. By depriving him of the use of the Log Book, plaintiff was also deprived of an opportunity to effectively cross-examine witnesses against him on the first incident. Under these circumstances the record indicates the sort of deprivation of rights which Mr. Justice Douglas denounced in his dissenting opinion to the first *Williams* decision wherein he noted that the constitution protects human rights in administrative hearings as well as in criminal proceedings under the Fifth Amendment.

Respondents' brief relies upon a line of cases exemplified by *Devine v. Campbell*, 194 F. 2d 876, which holds that the burden of producing witnesses at a Civil Service hearing is on the party who wants them. The significant thing to note in this case, however, is not a contention by the plaintiff that his request for the presence of witnesses was not carried out by the defendants. Rather, it is his contention that the witnesses were available but that their presence was forbidden by the defendants. The letters from the appointing authority make it clear that it would only permit five witnesses to appear and testify on plaintiff's behalf without regard to the number of witnesses which he required to adequately present his defense. Similarly, the defendants flatly refused to produce a log book which was essential to the plaintiff's defense.

Thus, the thrust of the plaintiff's case is not that the Government failed to discharge the plaintiff's duties in procuring witnesses, but rather that the Government ac-

tively interfered with and prevented the attendance of witnesses on the plaintiff's behalf.

Under this set of circumstances, then, plaintiff has demonstrated that he did all that he could do in producing witnesses since, if he could not compel their attendance by coercive process, the refusal of the defendants to allow the witnesses to testify ended whatever opportunity plaintiff had to present evidence on his own behalf.

Conclusion.

In view of the foregoing, it is clear that plaintiff has done all of those things which he could possibly have done to vindicate his rights and that his attempts were frustrated at every step by wilful interference by the respondents.

Respectfully submitted,

LIONEL RICHMAN,
LEWIS GARRETT,
HERBERT M. ANSELL,

By LIONEL RICHMAN,
Attorneys for Appellant.

Dated: February 16, 1967.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LIONEL RICHMAN



No. 21,068 ✓

United States Court of Appeals
For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,

Appellant,

VS.

REX L. BRUNSING, et al.,

Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

CARL HOPPE,

ERNEST M. ANDERSON,

2610 Russ Building,

San Francisco, California 94104,

RICHARD R. TREXLER,

141 West Jackson Boulevard,

Chicago, Illinois 60604,

Attorneys for Appellant.

FILED

DEC 29 1965

WM. B. LUCK, CLERK

Subject Index

	Pages
Introductory comments	1
Statement of the case:	
The proceedings in the District Court	2
The Holmberg patent in suit	3
The Poupitch patent in suit	5
The accused devices	6
Specification of errors	7
Argument:	
Prefatory comment	11
Defendants infringed the Holmberg patent	11
The doctrine of file wrapper estoppel is inapplicable as to the Holmberg patent	21
Defendants infringed the Poupitch patent	23
The Court erred in applying file wrapper estoppel with regard to the Poupitch patent	29
A narrow claim construction is not warranted by reason of the prior art teachings	31
Infringement is not avoided by non-use of the specific embodiments shown in the patents	32
Conclusion	34
Appendix:	
List of plaintiff's exhibits	i
List of defendants' exhibits	iii
Claims of Holmberg patent charged as being infringed..	iv
Claims of Poupitch patent charged as being infringed ..	ix
Holmberg patent drawings	xi, xii
Poupitch patent drawings	xiii

Table of Authorities

Cases	Pages
Bianchi v. Barili (9 Cir. 1948), 168 F.2d 793.....	28
Cameron Iron Works v. Stekoll (5 Cir. 1957), 242 F.2d 17	30
Chicago Pneumatic Tool Co. v. Hughes Tool Co. (10 Cir. 1938), 97 F.2d 945, cert. den. 305 U.S. 643.....	14
Del Francia v. Stanthony Corporation (9 Cir. 1960), 278 F.2d 745	35
Graver Mfg. Co. v. Linde Co. (1950), 339 U.S. 605, 70 S.Ct. 854	35
Hansen v. Colliver (9 Cir. 1960), 282 F.2d 66.....	18, 19, 21, 25, 27, 29, 35
Kemart Corp. v. Printing Arts Research Laboratories (9 Cir. 1953), 201 F.2d 624.....	35
Leeds & Catlin v. Victor Talking Mach. Co. (1909), 213 U.S. 301, 29 S.Ct. 495	30
Locklin v. Switzer Brothers, Inc. (9 Cir. 1961), 299 F.2d 160, cert. den. 369 U.S. 861.....	26
National Rejectors v. A. B. T. Mfg. Corp. (7 Cir. 1951), 188 F.2d 706, cert. den. 342 U.S. 828.....	28
Neff Instrument Corporation v. Cohu Electronics, Inc. (9 Cir. 1961), 298 F.2d 82.....	19, 24
No-Joint Concrete Pipe Co. v. Hanson (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843.....	20, 23, 29
Paper Bag Patent Case (1908), 210 U.S. 405, 28 S.Ct. 748..	33
Payne Furnace & Supply Co. v. Williams-Wallace Co. (9 Cir. 1941), 117 F.2d 823.....	30
Reinharts, Inc. v. Caterpillar Tractor Co. (9 Cir. 1936), 85 F.2d 628	15
Smith v. Mid-Continent Inv. Co. (8 Cir. 1939), 106 F.2d 622	33
Stearns v. Tinker & Razor (9 Cir. 1957, reh. den. 1958), 252 F.2d 589	15

TABLE OF AUTHORITIES

iii

Pages

Stuart Oxygen Co. v. Josephian (9 Cir. 1947), 162 F.2d 857	13, 16, 27, 28
Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co. (6 Cir. 1940), 110 F.2d 192.....	26
United States v. Parke, Davis & Co. (1960), 362 U.S. 29, 80 S.Ct. 503	34
Watters v. Kny-Scheerer Corporation (2 Cir. 1933), 68 F. 2d 27	18
Winans v. Denmead (1853), 15 How. (56 U.S.) 330.....	13, 16
Wire Tie Mach. Co. v. Pacific Box Corporation (9 Cir. 1939), 102 F.2d 543.....	30

Statutes

28 U. S. Code:	
Section 1291	1
Section 1338(a)	1
Section 2107	1

Rules

Federal Rules of Civil Procedure:	
Rule 42(b)	2
Rules of Court of Appeals for the Ninth Circuit:	
Rule 18(d)	7
Rules of Practice in Patent Cases:	
Rule 312	21, 22

No. 21,068

United States Court of Appeals

For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,

Appellant,

VS.

REX L. BRUNSING, et al.,

Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

Plaintiff-appellant files this opening brief in support of its appeal from a judgment of the District Court finding that defendants have not infringed any of the claims of plaintiff's patents 2,646,911 and 2,923,406.

JURISDICTION

Jurisdiction of the District Court is based upon U.S. Code, Title 28, Section 1338(a), this action having arisen under the patent laws of the United States.

Jurisdiction of this Court is based upon U.S. Code, Title 28, Section 1291, this appeal being taken from a final decision of a District Court of the United States. The judgment was entered on March 18, 1966 and the notice of appeal was filed April 13, 1966 (C.T. 291), within the 30-day period provided by U.S. Code, Title 28, Section 2107.

STATEMENT OF THE CASE

The Proceedings In The District Court

The present action is a consolidation of two separate actions for patent infringement. It involves U.S. Patent No. 2,923,406 and U.S. Patent No. 2,646,911. Appellant owns both patents.

A pretrial order filed July 9, 1965 provided that the issue of infringement only was to be tried. "All other issues are to remain to be fixed for trial at such time as the Court may determine after passing upon this infringement issue" (C.T. 200-N). That order was made pursuant to a motion brought by appellees under Rule 42(b), F.R.C.P. The trial commenced September 15, 1965 and was concluded September 22, 1965.

Appellant contends that appellees have made, used and sold devices covered by claims 1, 2, 4, 5, 7, 8, 9, 10, 11, 12 and 13 of U.S. Patent No. 2,646,911, issued to L. O. Holmberg on July 28, 1953 (hereinafter referred to as the "Holmberg patent"), and claims 1 and 2 of U.S. Patent No. 2,923,406, issued to O. J. Poupitch on February 2, 1960 (hereinafter referred to as the "Poupitch patent"). The claims which are charged as having been infringed are printed in the appendix to this brief, together with copies of the patent drawings.

The "related evidentiary issues" specified by the pretrial order (C.T. 200-F) were:

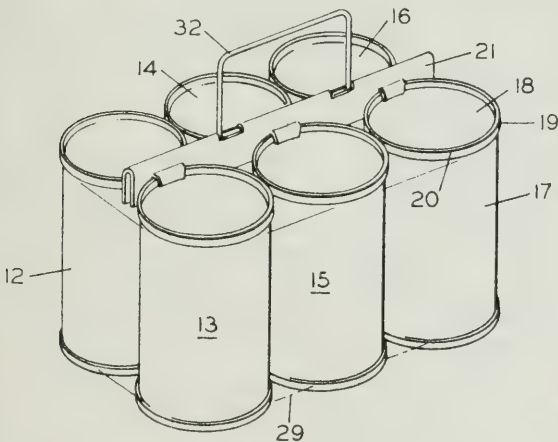
(a) "Whether defendants' container carrier clips come within the terms of any of the claims of the patents in suit."

(b) “Whether defendants’ container carrier clips come within the scope of any of the claims of the patents in suit as interpreted by proper application of the Doctrine of Equivalents.”

(c) “Whether plaintiffs are estopped by reason of the proceedings had in the Patent Office leading to the issuance of the patents in suit from asserting an interpretation of the claims of the patents which would cover the devices of defendants.”

The Holmberg Patent In Suit

A cut of the carrier package shown and described in the Holmberg patent is illustrated below.



In brief, Holmberg provides an elongated unitary structure forming a carrier package for pairs of conventional cans and having longitudinally spaced slots or throats

gripping the opposite faces of the pairs of can beads (PX 1). The Holmberg carrier is used with containers having projecting top rims and it comprises a body provided with pairs of oppositely disposed can-holding devices. Each can-holding device has an outside can-engaging grip (that portion of the body member forming the bottom of a slot and which is curved to mate with the outer surface of the can) and an inside can-engaging grip (that portion above the same slot which is curved to conform to the inner surface of the can rim). The inside can-engaging grip contacts the inside surface of the top rim of a can as to oppose the supporting engagement of the lower body portion below the slot and as to confine the rim of a supported can. The spacing between oppositely disposed can-holding devices is such that the bottom edges of a pair of supported cans are brought together and contact each other, each can counterbalancing the other.

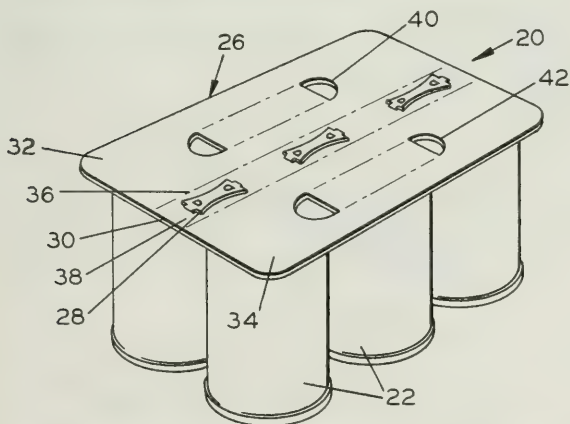
One object of the invention "is to provide a carrier which will support a plurality of grouped containers in such a manner that labels or advertising matter on the exterior of the containers may be clearly displayed" (PX 1, Col. 1, ll. 7-11). Another object "is to provide a carrier which may be quickly attached to or removed from a plurality of containers and which is simple in construction and economical to manufacture" (PX 1, Col. 1, ll. 24-26); and a further object "is to provide a carrier which engages only the top edge portions of said containers" (PX 1, Col. 1, ll. 28-30).

The Holmberg patent also contemplates other and additional details of construction, some of which are used by the accused device and some of which are not. For example,

Holmberg contemplates providing a handle or other means for manually grasping the body to carry the containers; the accused device provides finger openings in the body for the same purpose. The Holmberg patent also contemplates, however, that the handle may be formed separately from the body of the carrier and slideably mounted in spaced slots provided in the upper margin of the body. This detail of construction was not used in the manufacture of the accused device, but, then, none of the claims charged as having been infringed recites that detail, which is covered by claims 3 and 6, not here in issue.

The Poupitch Patent In Suit

A cut of the carrier package shown and described in the Poupitch patent is illustrated below.



Plaintiff's Poupitch patent (PX 3) adds to the teaching of Holmberg in providing a carrier that grips the can beads with a snap action. The inventor worked with Holm-

berg and his invention was to be an improvement over Holmberg (C.T. 279, Finding of Fact XVI). The operation of Poupitch is essentially the same as Holmberg except that a clip is applied to the containers by snap action. Each clip comprises inside and outside can-engaging means, one of which is made of resilient material for relatively spreading the margins between the can-engaging means. One specific object of the invention is to "provide a novel one-piece sheet material clip of the type mentioned above which is adapted to be resiliently snapped onto a plurality of rims of adjacent containers in a manner which provides a positive interlock between the clip and the containers so as to prevent subsequent removal of the containers until portions of the clip have been spread apart" (PX 3, Col. 1, ll. 34-40).

The Accused Devices

A cut of the carrier package formed with the accused devices is shown below.



The accused devices, like the carriers of Holmberg and Poupitch, relate to structures for carrying multiple numbers of containers having projecting top rims (C.T. 277 Finding of Fact XI). The purpose of all three structures is to provide a method of conveniently holding together and transporting a number of these containers (C.T. 277, Finding of Fact XI).

The defendants' accused device is a relatively flat plastic structure made by an injection molding process. It has three oppositely disposed interdependent sets of can-holding devices or clips (C.T. 280, Finding of Fact XX). Each can-holding device comprises an outside can-engaging means (one portion of a central rib) and an inside can-engaging means (a depending tongue or tab). Each tongue depends from the clip and engages the inside surface of the top rim on the can at such a location that it opposes the upward supporting engagement of the rib. Both the tongue and complementary rib are curved to conform with the cylindrical surface of a can. The margins between the tongue and rib define a horizontal slot or space which receives the rim of a supported can, and a pair of cans mounted in an interdependent set of can-holding devices contact each other adjacent their bottom edges, each can counterbalancing the other.

SPECIFICATION OF ERRORS

Pursuant to Rule 18(d) of this Court, Illinois Tool Works, Inc. urges that the District Court erred:

1. When it construed the claims of the patents in suit collectively "in light of the specifications and drawings" with the result that the claims were limited to the specific

embodiment illustrated and described, each claim being treated as if it contained the same limitations (Findings of Fact XIII, XXI, XXII).

2. When it found that the accused device does not have a body which is U-shaped (Finding of Fact XXI).

3. When it found that the accused device does not have horizontal slots in its sides (Finding of Fact XXI).

4. When it found that the Holmberg patent claims call for a handle, or a handle means, or means for manually grasping without regard to claims devoid of such limitations, and when it found that "due to the nature of the manner in which Holmberg must operate, the structure is restricted to the handle disclosed" and that the finger holes of the accused device "are not the same as the Holmberg handle and are different in operation" (Finding of Fact XXI).

5. When it failed to find that claims 4, 11, 12 and 13 of the Holmberg patent do not require a body having a U-shaped cross-section or equivalent means for providing slots for receiving the rims of a pair of adjacent containers.

6. When it failed to find that claims 1, 2, 5, 7, 8, 9 and 10 of the Holmberg patent do not require the presence of a handle or equivalent means as an element of the claimed combination.

7. When it failed to find that none of the claims of the Holmberg patent requires that the carrier be made from sheet material.

8. When it failed to find that none of the claims of the Holmberg patent requires that the carrier be con-

structed such that a container be inserted or removed when it is at an intermediate angle to the structure, or vice versa.

9. When it failed to find that the finger holes of the accused device are the full functional equivalent of the "handle", "handle means" and "means adapted for manually grasping" as recited in claims 4, 11, 12 and 13 of the Holmberg patent.

10. When it found that certain remarks made in an amendment filed June 18, 1953 in the prosecution of the Holmberg patent (and with regard to issued claim 13 only) restricted all claims of the patent to a device "that relies for its operation on the action of gravity and which allows free entrance and exit of a container at an intermediate angle, and a free downward swinging action for seating the container, and a free upward swinging action to accomplish removal" (Finding of Fact XIV).

11. When it found that the Poupitch patent claims are limited to a clip holding two cans without a handle member and without a method of providing for a structure including a plurality of similar clips (Finding of Fact XXII).

12. When it failed to find that the accused device is a one-piece resilient sheet material clip as recited in claims 1 and 2 of the Poupitch patent.

13. When it failed to find that the resilient tongue of the accused device is the full functional equivalent of the resilient flexible spring means recited in claims 1 and 2 of the Poupitch patent.

14. When it failed to find that portions of the accused device provide shoulders that are placed in spaces formed at opposite sides of abutting cans as recited in claims 1 and 2 of the Poupitch patent.

15. When it found that file wrapper estoppel is applicable with regard to the Poupitch patent by reason of applicant's abandonment of application claim 14, said claim having been rejected by the Examiner on grounds that it was "aggregative, as the inclusion of a plurality of similar clips does not form a patentable combination" and because there is "no invention in providing the handle for any article" (Finding of Fact XIX).

16. When it found that plaintiff's combination patents in suit did not solve the problem of providing a carrier which would hold cans securely and still provide for relatively easy removal of the cans from the carrier (Finding of Fact VIII).

17. When it found that plaintiff's patents were never commercialized and are so-called paper patents (Finding of Fact IX).

18. When it found that the accused device does not in any way use the idea or principle or teaching of either of plaintiff's patents in suit and that the means in operation of the accused device are different from those of either of the patents in suit (Finding of Fact XXII).

19. When it found that defendants have not infringed any of the claims of either of plaintiff's patents in suit (Conclusion of Law IV).

20. When it failed to find that defendants have infringed the claims of plaintiff's patent in suit.

ARGUMENT

This appeal does not dispute any of the District Court's findings of fact as to the construction of the accused devices or to the manner of their operation in comparison with devices described in the patents in suit. The appeal is primarily concerned with issues of law and their application to issues of fact correctly found by the District Court. More particularly, the issues of law relate to well-established principles of claim construction including the doctrine of equivalency and the doctrine of file wrapper estoppel. The argument will proceed by considering each of the two patents in suit in light of "differences" relied upon by the District Court for its finding of non-infringement. The patents will be considered separately and the assigned errors will be related to points of law previously applied by this and other Courts.

Defendants Infringed The Holmberg Patent

The District Court found certain differences between the accused device and the invention of Holmberg. It will now be shown that none of the supposed differences avoids infringement. This portion of the argument relates to specification of errors 1 through 9.

First, the District Court found that "the accused device does not have a body which is U-shaped (or an inverted U shape) either in cross section or in end view" (C.T. 281). The "U-shaped cross-section" feature is defined in several of the claims as follows:

"... a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof" (Claims 1 and 5)

"... a body having a U-shaped cross-section and having oppositely disposed horizontal slots in the sides thereof . . ." (Claim 2)

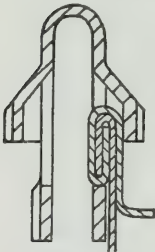
"... a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers . . ." (Claim 7)

"... a body having a U-shaped cross-section and having a plurality of spaced slots in each side thereof . . ." (Claim 8)

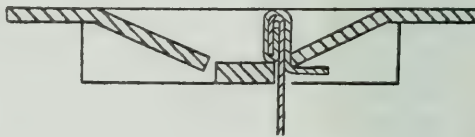
"... a body having a U-shaped cross-section and having spaced slots in each side thereof . . ." (Claim 9)

"... a body having a U-shaped cross-section . . ." (Claim 10)

At the outset, in order to emphasize the area as to which the foregoing claim language applies, there is shown below in side-by-side relationship, cross-sectional views of the Holmberg clip and the accused device.



Holmberg Clip



Accused Clip

In the case of the Holmberg clip, the cross-section of the body is shaped in the form of an inverted U, and the slots are located in the sides of the downwardly extending legs which form the U shape. On the other hand, in the case of the accused devices, the U-shaped

cross-section is in normal aspect, the legs of the U extending upwardly and diverging outwardly rather than in parallelism. In both cases, gripping is effected by those portions of the clip which extend downwardly from above.

Although there are obvious differences in appearance and while admittedly there is a change in shape, no different function has been shown to flow from such a difference. In each case, a single can is gripped from each side of the U, one part of the clip engaging the can exteriorly of and below the bead, and the other part engaging the can inside the rim. Appellant submits that the issue of whether the accused structure has a "U-shaped cross-section" can and should be resolved as a legal issue in support of infringement. In *Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857, this Court quoted from other authority and pointed out, page 861:

"'. . . Where the particular form is not an embodiment of the principle of the asserted invention, the patent is not restricted to the exact form of the construction shown in the diagrammatical drawing. . . .'"

This view as to a change in form not avoiding infringement was first announced in *Winans v. Denmead* (1853), 15 How. (56 U.S.) 329, where the Court pointed out, page 342:

"'. . . If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors

would be valueless, if it were enough for the defendant to say, your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed."

Furthermore, limiting the Holmberg patent to the exact form of the invention shown in the patent drawings is inconsistent with the final caveat of the specification (PX 1, Col. 4, ll. 30-36):

"The invention is not to be limited by the exact embodiment of the device shown, which is merely by way of illustration and not limitation, as various other forms of the device will, of course, be apparent to those skilled in the art without departing from the spirit of the invention or the scope of the claims."

The fact that a "U-shaped cross-section" is not a narrow novelty defining limitation is also shown by claims 4, 11, 12 and 13. None of them recites a carrier body having such a cross-section. Therefore, the supposed difference pertaining to "U-shaped cross-section" is not applicable to claims 4, 11, 12 and 13. Appellant submits that when claims are allowed by the Patent Office and some of them include a feature which others do not, that then the feature is not a narrow one requiring a perfect picture to make out a case of infringement [*Chicago Pneumatic Tool Co. v. Hughes Tool Co.* (10 Cir. 1938), 97 F.2d 945, 946-947, cert. den. 305 U.S. 643].

The second point of supposed difference between the accused device and that of the Holmberg patent, as found by the District Court, was "The accused device does not have horizontal slots in its sides" (C.T. 281).

Of those claims charged as being infringed, only claim 2 calls for "horizontal slots in the sides"; and claims 1, 4, 5, 7, 8 and 9 call for "slots in the sides". Claims 10, 11, 12 and 13 do not specify slots at all but, instead, the claims use such terms as "rim-engaging means" and "can-holding devices". Therefore, as to claims 10 through 13, infringement is controlled by the rule that it is the claims of a patent which measure the scope of the patent monopoly, not the illustration or description.

This rule was simply stated in *Stearns v. Tinker & Razor* (9 Cir. 1957, reh. den. 1958), 252 F.2d 589, where this Court said, page 596:

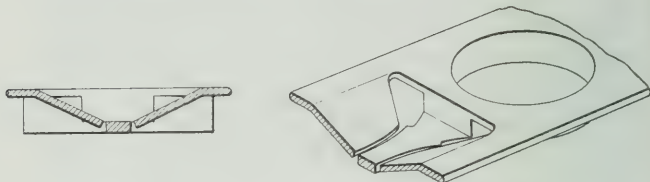
"It is axiomatic that only a claim of a patent can be infringed. The claims of a patent measure the scope of a patent monopoly. The claims may be explained and illustrated by the description. . . . But a description does not necessarily limit the claims. . . ."

This Court also held in *Reinharts, Inc. v. Caterpillar Tractor Co.* (9 Cir. 1936), 85 F.2d 628, 633-634:

"Appellant contends that the tractor described in the Wickersham specification is a 'frameless' tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham's invention is defined, not by the specification, but by the claims of his patent (citations omitted). There is in the claims no mention of a 'frameless' tractor. . . ."

Notwithstanding the fact that the carrier structures of claims 10 through 13 need not have slots, appellant submits that the accused device does, in fact, have "horizontal slots in its sides". This is shown by inspection of the

accused devices (PX 4, 4-A) and by reference to the following drawings of the accused clip:

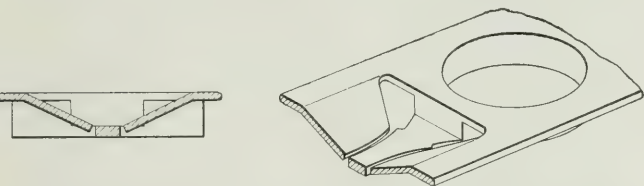


It will be apparent that the bead of a can is received through a curved horizontal slot formed between the lower rib and downwardly inclined tongue. Although the accused device differs in appearance from the carrier shown in the drawings of the Holmberg patent, both structures utilize a slot for the same purpose, namely, to embrace the bead edge of a can so that the can will be supported in the carrier. No different function flows from the mere fact that the sides of the accused device are inclined while the sides of the device shown in the Holmberg patent are vertical. Infringement is not avoided by merely changing the form of the construction shown in the patent drawings. [*Winans v. Denmead* (1853), 15 How. (56 U.S.) 329; and *Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857].

The third point of difference found by the District Court was that the accused device “does not have any structure whatever below the vertical openings created by the space between the arcuate tongue and arcuate central rib” (C.T. 281). This supposed difference stems from a recitation in some claims that there are “portions below said slots being curved to conform to the contour of the

side walls of the containers''. Only claims 1, 2 and 5 contain such recitations.

The District Court apparently overlooks the fact that the arcuate central rib of the accused device does, itself, extend below the opening between it and the arcuate tongue, and the further fact that the lower flange on the rib is curved to conform to the side walls of the containers. These details clearly show in the drawings below:



While there is a difference in degree as to the size and shape of the rib as compared with that body portion shown in the Holmberg patent drawings, neither the patent specification nor its claims so limits the invention.

A fourth difference found by the District Court is based on the fact that the accused device has a "resilient tongue" that allows the can to be inserted vertically and provides a "positive gripping action" that retains the bottoms of the cans in abutment at all times, whether the clip is resting or held (C.T. 282-283, para. nos. 4, 6, 7). The District Court distinguished such a structure from the one illustrated and described by Holmberg on the grounds that the patented device relied wholly upon gravity to keep the bottoms of the cans in abutment, and the cans are inserted or removed while they are at an acute or intermediate angle.

It is clear that gravity, by necessity, must produce a force upon the can carried by both the accused device and that shown in the Holmberg patent, a fact which defendant's expert admitted in his cross-examination (R.T. 568). Moreover, it has been held that a defendant cannot escape infringement merely by accomplishing the same result with a resilient member in lieu of or in addition to gravity. *Watters v. Kny-Scheerer Corporation* (2 Cir. 1933), 68 F.2d 27. At page 29 the Court said:

“Claim 4 calls for ‘pedally operated means for releasing the cover, and means for retaining the cover when closed.’ The means of the patent for retaining the cover when closed is its rearwardly tilted position plus the latch. But the defendant cannot escape infringement by omitting the latch and accomplishing the same result by the added weight of its baffle plate, or of its baffle plate plus a spring. These are within the range of equivalents which may fairly be accorded the patent, even though it be but a combination improvement. The same is true of claim 5.”

The Court's reliance upon an operational difference stemming from the use of a resilient tongue is to be regarded no more highly than as an improvement of the Holmberg clip. Although it may be an improvement to provide a resilient tongue as “an overhanging element”, the rule of patent claim construction is that one who simply improves a patented device without changing its manner of operation does not avoid infringement.

In *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, this Court considered an apparatus for replacing the fiber core

of a used wire rope with a new substitute core. The patented device disclosed a specific form of guide through which the used wire rope was drawn and the accused device used merely the top of a work table as a guide. At page 69, the Court said:

“In our view the accused device performs substantially the same function in substantially the same way and obtains the same results as are embraced in claim 1 of the patent. It may be, as indicated by the trial court, that appellees’ device is superior in its simplicity in the use of a table top instead of a guide. If the table top is an improvement it is nevertheless the equivalent of the guide and is merely a change in form. . . .”

Furthermore, only claims 11, 12 and 13 specify a carrier that utilizes gravity to bring the ends of the supported cans into abutment. As a consequence, the use of gravity cannot even be implied in claims 1, 2, 4, 5, 7, 8, 9 and 10. This is likewise brought out in *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, wherein the Court, page 69, referred to “the well established rule of construction that a broad claim will not be construed to contain limitations expressed in the more narrow claims.” It is settled that the accused device cannot escape infringement by merely adding features if it otherwise adopts the basic features of the patent [*Neff Instrument Corporation v. Cohn Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82, 89-90].

The only other difference found by the Court in its comparison of structures relates to the use of “a handle or a handle means or means for manually grasping”. The Court recognized (C.T. 282, para. no. 5) that the accused

device provides "finger holes", but it regarded those holes as not being the same as the Holmberg handle. "This is because the accused device overcomes the action of gravity and the cans are securely retained in the accused device regardless of the position in which it is held."

With regard to the claims alleged as having been infringed, a handle is described in the claims as follows:

"... a handle for lifting said body portion with said containers secured thereto." (Claim 4)

"... handle means associated therewith . . ." (Claims 11 and 12)

"... means adapted for manually grasping for carrying the body . . ." (Claim 13)

None of claims 1, 2, 5, 7, 8 or 10 recites or includes a handle as a necessary part of the combination. Nor is there any reason for believing that a handle is an indispensable part of the invention. Of course, the use of a handle is desirable for carrying any can package assembly, whether it be a wire bale, as in the case of Holmberg, or the two-finger holes in the case of the accused clip. As a matter of substance, the only difference between Holmberg's handle and that of the accused clip is that the latter is made in one piece with the body of the carrier, whereas Holmberg assembled the handle means and the carrier as two pieces. But, a substantial body of law—

"... recognizes that infringement is not avoided by making into one part that which has been shown as two." [*No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, 15, cert. den. 382 U.S. 843].

Significantly, other claims of the Holmberg patent, not in suit, define the handle with specificity. Claim 3 calls for “a retractable handle having its side portions slidably mounted in said slots”; and claim 6 recites “said body having openings . . . for receiving the ends of a handle member and means between the sides of said body for maintaining said ends in said openings.” But no details of the handle are recited in any other claim of the patent. Hence, the court below applied an incorrect legal standard when it read specific structure into the Holmberg claims in suit [*Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, 69].

**The Doctrine of File Wrapper Estoppel
Is Inapplicable as to the Holmberg Patent**

With regard to the Holmberg patent, the Court found that a certain statement made in an amendment during the patent prosecution limited the invention “to a device that relies for its operation on the action of gravity and which allows free entrance and exit of a container at an intermediate angle, and a free downward swinging action for seating the container, and a free upward swinging action to accomplish removal” (C.T. 279, Finding of Fact XIV). This finding is the basis for specification of error 10.

The statement which the Court refers to was made after the notice of allowance had already been issued, and only then for the purpose of having claim 21 of the application (claim 13 of the patent) entered under Rule 312 of the Rules of Practice in Patent Cases. Rule 312 provides:

“Amendments after the notice of allowance of an application will not be permitted as a matter of right,

but may be made, if the printing of the specification has not begun, on the recommendation of the primary examiner, approved by the Commissioner, without withdrawing the case from issue.”

It is common practice for the Patent Office to refuse applicant the right to add any claims under Rule 312 unless he clearly shows that such claim is allowable for the same reasons that warranted the allowance of another claim in the case. Such reason had been given in the Holmberg application (DX V, pp. 32-33) wherein applicant stated:

“It will be noted that claim 21 reads clearly on the disclosed construction, as the changes referred to do not in any material respect enlarge the claim or touch upon the points of true novelty. Furthermore, the claim is allowable for the same reasons that warranted the allowance of claim 20 (patent claim 12). The character of the holding devices and their spacing so that the cans are held by the upper rim and the downward swinging action brings about an abutment at the bottom edge of the can is included in the claim and thus defines the essence of novelty of the invention.”

Appellant submits that the argument made to the Patent Office in no way restricts Holmberg to a device that:

1. Relies for its operation on the action of gravity;
2. Allows free entrance and exit of a container at an intermediate angle;
3. Provides a free downward swinging action for seating the container; and

4. Provides a free upward swinging action to accomplish removal.

None of the four statements of operation and function referred to in the District Court's opinion (C.T. 279) is required of a carrier that holds cans by their upper rims and an abutment at the bottom edges of the cans. This is all the more evident since the accused structure clearly utilizes the "essence of novelty of the invention", as stated in the amendment of June 18, 1953.

Furthermore, none of the claims, not even claim 13 (application claim 21), defines the invention as being a carrier that relies for its operation on the action of gravity alone, or one that allows "free entrance and exit of a container at an intermediate angle", or one that provides a "free downward swinging action", or one that provides a "free upward swinging action". There simply is no basis for imposing limitations and restricting the Holmberg invention when the claims are devoid of such limitations. Moreover, the claims were not limited to escape cited prior art and, therefore, the doctrine of file wrapper estoppel is not applicable. [*No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843]. Accordingly, appellant submits that the Court erred when it so restricted the invention by reason of the amendment of June 18, 1953.

Defendants Infringed The Poupitch Patent

The following portion of this argument relates to specification of errors 11 through 14.

Appellant submits that the District Court erred in its construction of the claims of the Poupitch patent as it did in its construction of the claims of the Holmberg patent. While it appears that the District Court had the claims of the Poupitch patent in mind it did not attempt to apply the claims to the structural features of the accused device.

The Court held that the Poupitch structure was limited to a clip holding two cans without a handle member and without a method of providing for a structure including a plurality of similar clips (C.T. 283). While it is true that both claims charged as having been infringed cover a clip structure for holding two cans and that there is no mention in either claim of a handle member, literal infringement is not avoided simply by providing a plurality of clips (rather than just one) and additionally providing a handle member [*Neff Instrument Corporation v. Cohu Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82]. The fallacy of the Court's holding is highlighted by the patent disclosure. The very interpretation of the claims by such a limited construction means that structures made precisely as shown in Fig. 8 of the Poupitch patent do not come under that patent. For these reasons, appellant submits that the first point of difference noted by the District Court is irrelevant and immaterial to resolving the issue of infringement.

The second point of difference relied upon by the District Court was that the invention covered a "one-piece sheet material clip, while the accused device is not" (C.T. 283). Inasmuch as the accused device is clearly a "one-piece" structure, the Court must have found a difference

in the kind of "sheet material" used by defendant in its manufacture of its accused clip. The District Court apparently limited the claims of the Poupitch patent to the particular clip shown in the patent drawings, which is described in the specification as follows (PX 3, Col. 2, ll. 34-37):

"The clip 28 is shown in detail in Figs. 1, 2 and 3 and it will be appreciated that this clip is of one-piece construction and is formed from sheet material such as resilient sheet metal. . . ."

Appellant submits that it is improper for the Court to limit the Poupitch patent on the basis of a mere reference to one type of material that may be used. The words "sheet material" admit of many types of materials, including plastics, as used in the accused device. Importantly, the plastic material used by defendant is resilient and, as the District Court found, the accused device itself is "a relatively flat plastic structure made by an injection molding process" (C.T. 280, Finding of Fact XX).

It is significant that no change in mode of operation is alleged to flow from any difference in the plastic material used in the manufacture of the accused device. Even though the substitution of plastic for metal may be considered an improvement, still infringement is not avoided [*Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66].

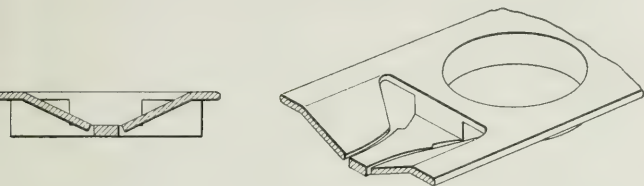
The Court's finding of no infringement was also based on the fact that the accused device supports the cans a certain distance apart while the cans shown in the Poupitch patent are "either actually abutting or very close together" (C.T. 283, Finding of Fact XXII).

The introductory portion of claim 1 describes a plurality of cylindrical cans that are "disposed in side-by-side substantially abutting . . . relationship". Appellant submits that the accused device supports the cans in precisely that manner. Adjacent cans exert the same forces against each other if they abut through the interposition of a thin rib of plastic material as when they abut directly. Moreover, the word "substantially" so modifies the word "abutting" as to make it clear that precise abutment is not required. The word "substantially" is a word of art in patent claim drafting which connotes approximation [*Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co.* (6 Cir. 1940), 110 F.2d 192, 198; and *Locklin v. Switzer Brothers, Inc.* (9 Cir. 1961), 299 F.2d 160, cert. den. 369 U.S. 861].

Appellant's position that the accused device forms a package with cans that are "substantially abutting" is essentially the same as the holding in *Bianchi v. Barili* (9 Cir. 1948), 168 F.2d 793. In that case, the defendant argued that two adjacent rollers in a ravioli machine did not contact one another because the dough of the ravioli was interposed between the two rollers. There the Court rejected defendant's argument as lacking in substance. The same ruling should apply in this case.

The District Court also found a difference between the accused device and that of the Poupitch patent in that the "claimed structure has two dependent tabs with shoulders which are placed in the spaces formed at the opposite sides of the abutting cans, while the accused device has no element whatsoever in these spaces." (C.T. 283, Finding of Fact XXII, 3). It is believed that the

Court overlooked those rib portions of the accused device which hang downwardly into the same spaces occupied by the two dependent tabs of the Poupitch clip. These elements of the accused device are shown below:



Also, the end supports for the central rib provide the sole support of the engaged cans, just as do the dependent tabs illustrated in the Poupitch patent. Inasmuch as no change in mode of operation occurs as a result of the obvious difference in configuration, appellant submits that such a change does not avoid infringement [*Stuart Oxygen Co. v. Josephian* (9 Cir. 1947), 162 F.2d 857; *Hansen v. Col-liver* (9 Cir. 1960), 282 F.2d 66].

The only other difference between the patented structure and the accused device as found by the District Court (C.T. 283-284, Finding of Fact XXII, par. Nos. 4 and 5) resides in the fact that the device shown in the Poupitch patent utilizes a can rim support that is resilient and a rigid member for engaging the inside of the top of the rim, whereas the accused device provides a rigid supporting member and a resilient tongue for engaging the inside of the top of the rim. This difference, appellant submits, does not avoid infringement of either parent claim 1 or dependent claim 2. This difference is but a reversal of the function of cooperative parts within the purview of

authorities collected and applied in *National Rejectors v. A.B.T. Mfg. Corp.* (7 Cir. 1951), 188 F.2d 706, 708-709, cert. den. (1951), 342 U.S. 828. *Bianchi v. Barili* (9 Cir. 1948), 168 F.2d 793, 800 is to the same general effect.

Claim 1 of the patent provides: "one of said means (either the first or second locking means) comprising resiliently flexible spring means for relatively spreading said margins and opening said throats during assembly of the can package for receiving rims of cans disposed in substantially abutting parallel relationship sufficiently to enable said first locking means to be snapped beneath the can rims and for subsequently relatively shifting said margins together for closing said throats and locking the cans and the clip in assembled relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart." Thus, the invention as claimed fully contemplates that the "resiliently flexible spring means" may be provided either as a part of the "tabs" or as part of the "flanges". This is particularly true since the specification closes with the following statement (PX 3, Col. 4, ll. 57-61):

"While the preferred embodiments of the present invention have been shown and described herein, it is obvious that many structural details may be changed without departing from the spirit and scope of the appended claims."

Even if the accused structure be considered an improvement over that shown in the Poupitch patent, still infringement is not avoided under the previously cited authorities of *Stuart Oxygen Co. v. Josephian* (9 Cir.

1947), 162 F.2d 857, *Hansen v. Colliver* (9 Cir. 1960, 282 F.2d 66, and *No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, cert. den. 382 U.S. 843.

For the reasons stated, plaintiff submits that both claims of the Poupitch patent are infringed both literally and substantively by the accused clip.

**The Court Erred in Applying
File Wrapper Estoppel With
Regard to the Poupitch Patent**

The District Court found that file wrapper estoppel is applicable with regard to Poupitch (C.T. 280, Finding of Fact XIX). The basis for this estoppel as specified in the Court's Memorandum of Decision is that claim 14 was abandoned after it had been "rejected by the examiner on the grounds that it was 'aggregative, as the inclusion of a plurality of similar clips does not form a patentable combination,' and because there is 'no invention in providing a handle for any article.' . . ."

The import of the Court's finding suggests that the Poupitch patent covers only devices for holding two cans at a time and that by reason of using three clips rather than one, defendants' accused device avoids infringement. The Court's finding further suggests that by cancelling claim 14, the inventor limited his invention only to devices that did not use a handle and, therefore, defendants' use of a handle as part of its carrier avoids infringement.

Although the doctrine of file wrapper estoppel prevents applicant from now asserting invention on the concept of simply providing a plurality of clips or a handle, that

doctrine certainly does not mean that the claims of the patent do not cover the device which is shown in Fig 8 of the patent. The mere fact that the applicant acceded to the rejection of claim 14 has nothing to do with the scope or construction of claims 1 and 2.

Appellant is unaware of any decision that would support the District Court's use of file wrapper estoppel as to claims which have been neither amended nor cancelled from the application. Moreover, the Court's use of the doctrine to restrict the invention of claims 1 and 2 in light of a cancelled claim to different subject matter is directly contrary to this Court's decision in *Payne Furnace & Supply Co. v. Williams-Wallace Co.* (9 Cir. 1941), 117 F.2d 823, cert. den. 313 U.S. 572, where it held, page 828:

“ . . . The rejected claims were for different combinations, and as we understand it any estoppel could extend no further than to the canceled combinations. *Johnson Co. v. Philad Co.*, 9 Cir., 96 F.2d 442, 444.”

Each claim stands on its own footing and is to be regarded as a separate specification of invention. *Leeds & Catlin v. Victor Talking Mach. Co.* (1909), 213 U.S. 301, 319, 29 S.Ct. 495; *Wire Tie Mach. Co. v. Pacific Box Corporation* (9 Cir. 1939), 102 F.2d 543, 551; and *Cameron Iron Works v. Stekoll* (5 Cir. 1957), 242 F.2d 17. As far as claims 1 and 2 are concerned, it makes no difference whether the accused device possesses one or three pairs of can-holding devices, nor does either claim require the use of a handle. Accordingly, appellant submits that the doctrine of file wrapper estoppel as applied by the District Court was erroneous.

**A Narrow Claim Construction
Is Not Warranted By Reason
Of Prior Art Teachings**

This portion of the argument relates to specification of error 16.

The District Court found that:

“The prior art introduced demonstrates that both of plaintiff’s combination patents in suit were improvements, but did not solve the problem of providing a carrier which would hold cans securely and still provide for relatively easy removal of a can from the carrier.” (C.T. 277, Finding of Fact VIII)

There was essentially no testimony given during trial as to the teaching of any prior art references. Defendants’ counsel, after reading the names and numbers of ten patents, merely asked defendants’ witness the following questions and received the following answers:

“And I will ask you if these, each of them have some elements which, in a general way, in your opinion, constitute part of the prior art?

“A. Yes. Do you want me to go over each one?

“Q. No, no.

“Now, just two more, McWethy, 2519149, application filed June 7, 1948, issued August 15, 1950.

“And the only reason I hand you this separately—is there any tipping action disclosed in that patent that finds some similarity in the Holmberg?

“A. McWethy teaches inserting one of two pails in a holder by tipping the pail during the step of inserting it.” (R.T. 521-522)

There was no further testimony on the prior art during the trial. Defendant simply placed in evidence a book of prior art patents (R.T. 531; DX X) containing 17 patents,

only five of which relate to a package of containers and none of which anticipates the claims of either patent in suit. Importantly, defendant offered no reason or explanation which would justify the Court's narrow construction of the patent claims. Even defendants' brief after trial (C.T. 245-273) makes no mention of any prior art, let alone a showing as to what importance the prior art might have in limiting the claims. In contrast, Plaintiff's Opening Brief After Trial (C.T. 228-235) analyzed the prior art contained in defendants' book of prior art patents (DX X) to show that there was absolutely no reason for applying a limited construction to the claims. Clearly, the accused structure is neither based on nor derived from the prior art.

**Infringement Is Not Avoided By
Non-Use Of The Specific Embodiments
Shown In The Patents**

The following arguments relate to specification of error 17.

The District Court found that "plaintiff's patents were never commercialized, and are so-called 'paper patents.'" (C.T. 277, Finding of Fact IX). This finding was made solely on the basis that appellants had not commercialized the exact form of the invention illustrated and described in the specification (R.T. 139-140). The finding completely ignores the fact that defendant's own use of the invention in the manufacture and sale of "some 30-odd million of the accused device" (C.T. 277, Finding of Fact X) itself demonstrates a commercial success of the invention. In any event, a patent does not become a "paper patent" merely because the owner does not use the construction

shown in the drawings and described in the specification [*Smith v. Mid-Continent Inv. Co.* (8 Cir. 1939), 106 F.2d 622].

Appellant submits that the finding that the patents in suit are "paper patents" clearly shows that the District Court viewed the invention of each patent as being specifically limited to the exact embodiment shown and described. But even "paper patents" (those that have not been put into commercial use by the patent owner) are entitled to protection [*Paper Bag Patent Case* (1908), 210 U.S. 405]. The *Paper Bag Patent Case* also supports appellant's contention that non-use of the exact embodiment shown and described in a patent is no reason for disregarding both the claims of the patent and the doctrine of equivalency in determining the issue of infringement.

The facts of the *Paper Bag Patent Case* are similar to those of this case in that defendants urged that the patent was to be limited by the detailed description contained in the specification, especially since the owner of the patent did not use the invention. But the Supreme Court said, page 418:

"We think it is clear that the court considered that Liddell (the patentee) sought to comply with § 4888 of the Revised Statutes. In other words, he filed a description of his invention, explained its principle and the best mode in which he 'contemplated applying that principle,' and did not intend to give up all other modes of application. An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. 'The principle of the invention is a unit, and invariably the modes of its embodiment

in a concrete invention may be numerous and in appearance very different from each other.' Robinson on Patents, § 485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. . . ."

Thus, the District Court applied the wrong legal standard when it limited the invention upon the premise that neither of the specific devices was commercialized.

Errors 18, 19 and 20 are mere conclusionary errors based upon the prior mentioned errors and hence are not given separate treatment herein. These errors become moot if this Court does not accept appellant's contention with regard to any of asserted errors 1 through 17.

CONCLUSION

In conclusion, plaintiff asks that the judgment of the District Court be reversed and that U.S. Letters Patent No. 2,646,911 and No. 2,923,406 be held as infringed by the construction and use of defendants' accused devices, with instructions to try the remaining issues of fact.

The error below to which this appeal is directed resides in the improper application of law to the facts as found. As in *United States v. Parke, Davis & Co.* (1960), 362 U.S. 29, 44: "The District Court premised its ultimate finding . . . on an erroneous interpretation of the standard to be applied." Although the question of infringement is normally one of fact, in this case the facts are not in

dispute. Therefore, the question of infringement resolves itself into one of law, depending on a comparison between the patent claims in issue and the accused devices, and the correct application thereto of the law of equivalency. *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66; *Kemart Corp. v. Printing Arts Research Laboratories* (9 Cir. 1953), 201 F.2d 624; *Del Francia v. Stanthony Corporation* (9 Cir. 1960), 278 F.2d 745.

The proper standard of infringement is laid down in the landmark decision *Graver Mfg. Co. v. Linde Co.* (1950), 339 U.S. 605. There, at page 607, the Supreme Court said:

“In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

“But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention

and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.”

Respectfully submitted,

CARL HOPPE,

RICHARD R. TREXLER,

ERNEST M. ANDERSON,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL HOPPE,

Attorney for Appellant.

(Appendix Follows)

Appendix

Appendix

LIST OF PLAINTIFF'S EXHIBITS

		Iden.	Offered	Rec'd
1	Copy of Holmberg patent 2,646,911	20	20	21
2	Assignment from Lawrence O. Holmberg to Illinois Tool Works Inc. dated 11/12/63	21	30	30
3	Copy of Poupitch patent 2,923,406	23	23	23
4	Accused Phantom clip	25	25	26
4-A	Accused Brunsing clip	56	57	57
5-A	Chart, enlargement of Holmberg patent drawing	56	104	104
5-B	Chart, enlargement of Holmberg patent drawing	56	104	104
6	Holmberg clip colored in different colors	56	104	104
7	Comparison chart of Holmberg clip and Brunsing clip	47	104	104
8	Accused Phantom clip colored in different colors	49	104	104
9	Claim chart, Holmberg claim 1	59	104	104
10	Claim chart, Holmberg claim 2	65	104	104
11	Claim chart, Holmberg claim 4	65	104	104
12	Claim chart, Holmberg claim 5	69	104	104
13	Claim chart, Holmberg claim 7	71	104	104
14	Claim chart, Holmberg claim 8	74	104	104
15	Claim chart, Holmberg claim 9	76	104	104
16	Claim chart, Holmberg claim 10	76	104	104
17	Claim chart, Holmberg claim 11	76a	104	104
18	Claim chart, Holmberg claim 12	79	104	104
19	Claim chart, Holmberg claim 13	80	104	104
20	Written statement of Mr. Poupitch on Holmberg patent	58	104	104

List of Plaintiff's Exhibits—Continued

		Iden.	Offered	Rec'
21	Chart enlargement of Poupitch patent	81	104	104
22	Poupitch clip exemplar	86	104	104
23	Comparison chart of Poupitch clip and Brunsing clip	91	104	104
24	Claim chart, Poupitch claim 1	93	104	104
25	Claim chart, Poupitch claim 2	102	104	104
26	Beer can, Heileman's Old Style	409	605	605
27	Yummy ginger ale can	409	605	605
28	Enlarged photograph of cross- section of can, Exh. 26	409	605	605
29	Photograph of cross-section of can, Exh. 27	410	605	605
30	Cut can	421	605	605
31	Defendants' advertising material	556	605	605
32	Defendants' advertising material showing accused clip	559	605	605

LIST OF DEFENDANTS' EXHIBITS

		Iden.	Offered	Rec'd
A-1	Holmberg exemplar	7	7	7
B-1	Poupitch exemplar	7	7	7
C-1	Brunsing exemplar	7	7	7
D	Exemplar made by Holmberg	108	110	111
E	Copy of U. S. Patent 2,874,835	149	531	533
F	Copy of U. S. Patent 3,016,136	157	531	533
G	Poupitch Clip	214	531	533
H	Sketch drawn by witness	215	531	533
I	Sketch drawn by witness	216	531	533
J	Receipt	241	244	244
K	Exemplar, clip, Specimen 1	244	244	244
L	Exemplar, clip, Specimen 2A	246	246	246
M	Exemplar, clip, Specimen 2B	247	247	247
N	Exemplar, clip, Specimen 3	247	247	247
O	Carrier, "Campbell's Tomato Soup"	247	247	247
P	Drawing	393	531	533
Q	Drawing	394	531	533
R	Drawing	395	531	533
S	Portion of accused device	445	531	533
T	Portion of accused device	459	531	533
U	File wrapper Poupitch patent	497	531	532
V	File wrapper Holmberg patent	503	531	532
W	Patent 2,815,855	529	531
X	Patents with exception of Fisher	531	530	530
Y	Campbell soup can	603	603	603

Claims of L. O. Holmberg
Patent No. 2,646,911
Charged As Being Infringed

1. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, the portions below said slots being curved to conform to the contour of the side walls of the containers and portions of said body along the bottom edges of said slots providing supports for said rims, the portions above said slots being curved to conform to the inner surfaces of said rims and positioned to engage said inner surfaces when said rims are supported along said lower edges.

2. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed horizontal slots in the sides thereof, the portions of said sides below said slots being curved to conform to the contour of the side walls of the containers, the portions of said sides above said slots overhanging said first named portions and being curved to conform to the contour of the inner surfaces of said rims.

4. A carrier for containers having projecting top rims comprising a body having slots in the sides thereof for receiving said rims, body portions along the bottom edges of said slots being positioned to supportingly engage the under surfaces of said rims, body portions along the top edges of said slots being positioned to engage the inner surfaces of said rims and maintain the under surfaces of said rims in engagement with the body portions along

the lower edges of said slots and a handle for lifting said body portion with said containers secured thereto.

5. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, said body having round cutout portions at the ends of said slots, the diameter of said round portions being greater than the width of said slots, body portions along the bottom edges of said slots shaped to conform to the contour of the surfaces of the side walls of said containers, body portions above said slots and between said rounded portions overhanging said second named portions shaped to conform to the contour of the inside surfaces of said rims and the edges of said slots being spaced to permit the insertion of said rims when the latter are disposed at an acute angle to the sides of said body.

7. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers, the portions of said body along the lower edges of said slots being positioned to support the under surfaces of said rims and portions along the upper edges positioned to engage the inner surfaces of said rims whereby the lower margins of opposite containers abut each other when said carrier is supporting the containers.

8. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having a plurality of spaced slots in each side thereof, the distance between the centers of the slots corresponding to the diameter of the containers and the slots in

each side being aligned with each other whereby the lower margins of opposite containers abut each other when said containers are supported by their top rims in said slots.

9. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having spaced slots in each side thereof, the slots in each side being aligned with each other, whereby when said containers are supported by the under surfaces of their top rims the lower margins of opposite containers will abut each other and said containers will be supported in a substantially upright position by said carrier.

10. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section, rim engaging means on each side of said body in alignment with each other whereby the lower margins of opposite containers abut each other when said containers are supported on said body by their top rims.

11. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location

thereon as to oppose the engagement of said outside can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position.

12. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can engaging means, said inside and outside can engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing down-

wardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

13. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member including means adapted for manual grasping for carrying the body and a pair of independent can-holding devices each of which is adapted to engage the top rim of one can, respectively, of a pair of cans, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can-engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent

the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can-engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can-engaging means when the cans are swung downwardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

Claims of O. J. Poupitch
Patent No. 2,923,406 Charged
As Being Infringed

1. A can package comprising a one-piece resilient sheet material clip, and a plurality of cylindrical cans or the like having annular end rims disposed in side-by-side substantially abutting and parallel relationship securely retained by said clip, said rims having a predetermined thickness, said clip comprising generally planar horizontal body means substantially traversing an area of substantial abutment of the cans and spaces between the cans at opposite sides of said area, a plurality of first locking means integral with and depending from opposite end portions of said body means disposed in said spaces and presenting surfaces engaging beneath the rims of the cans, and a plurality of second locking means integral with said body means having portions located toward opposite ends of and depending from said planar body means and engaging inner surfaces of the can rims and respectively cooperating with said first locking means, each cooperable

pair of said first and second locking means having margins defining a throat which normally has a dimension transversely of a rim less than said rim thickness for preventing a rim of a can from passing therethrough, one of said means comprising resiliently flexible spring means for relatively spreading said margins and opening said throats during assembly of the can package for receiving rims of cans disposed in substantially abutting parallel relationship sufficiently to enable said first locking means to be snapped beneath the can rims and for subsequently relatively shifting said margins together for closing said throats and locking the cans and the clip in assembled relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart.

2. A can package, as defined in claim 1, wherein said one means comprising said spring means is one of each of said cooperable pairs of locking means and is provided with rim engageable cam means for effecting relative movement between cooperable first and second locking means for permitting entry of a rim between said first and second locking means as an incident to the application of the clip to adjacent substantially abutting cans.

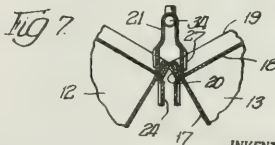
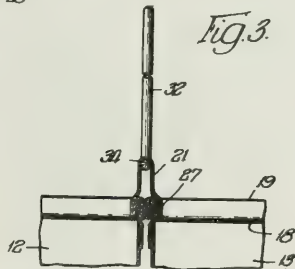
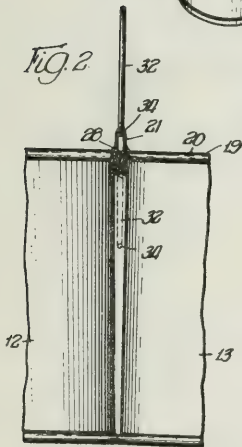
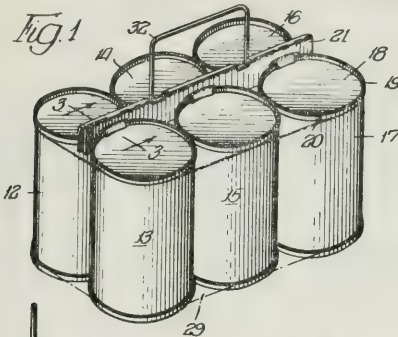
July 28, 1953

L. O. HOLMBERG
CONTAINER CARRIER

2,646,911

Filed Aug. 19, 1949

2 Sheets-Sheet 1



INVENTOR.
Lawrence O. Holmberg.

BY

Wilkinson, Hurley, Byron & Hume
Attys.

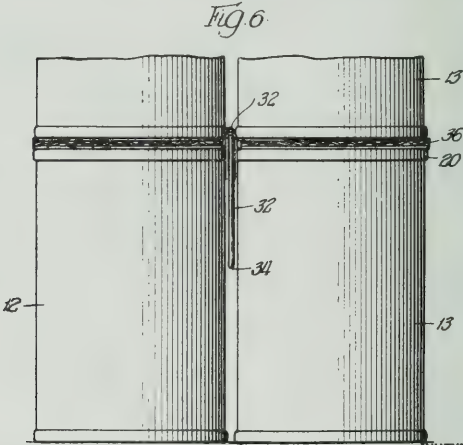
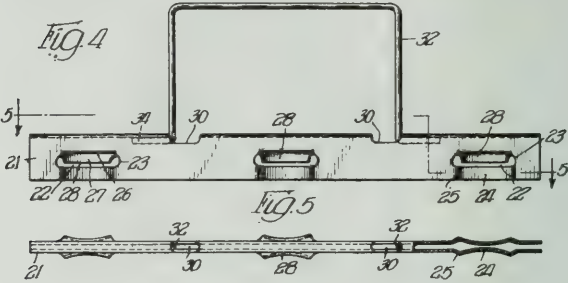
July 28, 1953

L. O. HOLMBERG
CONTAINER CARRIER

2,646,911

Filed Aug. 19, 1949

2 Sheets-Sheet 2



INVENTOR
Lawrence O. Holmberg
BY

Hilkinson, Hunkley, Byers & Hunkley

Feb. 2, 1960

O. J. POUPITCH
CONTAINER CARRIER

2,923,406

Original Filed Oct. 30, 1950

Fig. 1.

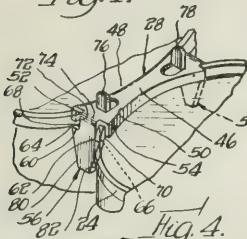


Fig. 2.

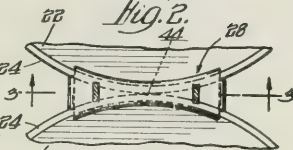


Fig. 3.

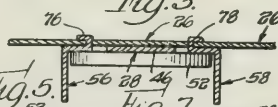


Fig. 4.

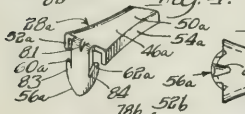


Fig. 5.

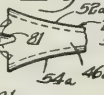


Fig. 7.

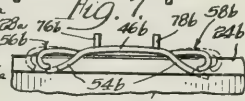


Fig. 6.

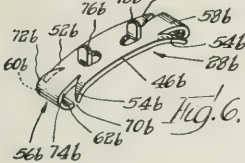


Fig. 8.

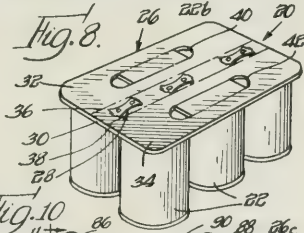


Fig. 10.

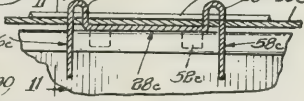


Fig. 9.

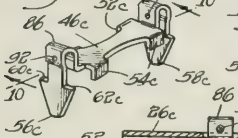
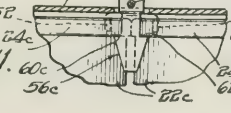


Fig. 11.



INVENTOR.

Ougljasa Jules Poupitch

BY

Olson & Tuxley

attys

No. 21,068

United States Court of Appeals
For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,	}
VS.	
REX L. BRUNSING, et al.,	
	<i>Appellant,</i>
	<i>Appellees.</i>

BRIEF FOR APPELLEES

LOUIS F. HAWKINS,
HAWKINS & HAWKINS,
880 Las Gallinas Avenue,
San Rafael, California,
Attorneys for Appellees.

FILED

FEB 15 1967

FEB 20 1967

WM. B. LUCK, CLERK

Subject Index

	Page
Jurisdiction	1
Statement of case	1
Summary of argument	2
Appellees have not infringed the Holmberg or Poupitch patent	3
The U shape is essential for Holmberg and Poupitch ...	8
The omission of an element from a combination patent avoids infringement	13
The addition of "snap action" adds no substance to appellant's case	16
The doctrine of file wrapper estoppel is applicable to Holmberg and Poupitch	21
The prior art restricts the construction of the Holmberg and Poupitch claims	26
The lack of commercial utility and acceptance acts to restrict the construction of the Holmberg and Poupitch claims	27
The accused device lacks essential elements of each of appellant's claims in suit	29
Conclusion	30

Table of Authorities Cited

Cases	Pages
Air Devices, Inc. v. Air Factors, 210 Fed. 2d 481.....	27
Boyden Power-Brake Co. v. Westinghouse (1897) 18 S.Ct. 707	20
Burr v. Duryee, 1 Wall. 351.....	20
Chicago Pneumatic Tool Co. v. Hughes Tool Co. (1938) 97 Fed. 2d 945	16
General Motors v. Kesling, 164 Fed. 2d 824, Cert. Denied 333 U.S. 855, 92 L. Ed. 1135.....	28
Graver v. Lindy, 339 A.U.S. 605.....	4, 12, 13
Lockewood v. Langendorf United Bakeries, Inc. (1963) 324 Fed. 2d 82	13, 29
Payne Furnace & Supply Co. v. Williams-Wallace Co. (9th Cir. 1941) 117 F. 2d 823, Cert. Denied 313 U.S. 572.....	22, 23
Simons v. Davidson (9th Cir. 1939) 106 Fed. 2d 518.....	13
Smith v. Mid-Continent Inv. Co. (8th Cir. 1939) 106 F. 2d 622	28
Stewart Oxygen Co. v. Josephian (1947) 162 Fed. 2d 857..	15, 16
Vaney v. Campbell, 1 Black (66 U.S.) 427.....	13

Statutes

28 U.S.C., Section 1291	1
28 U.S.C., Section 1338(a)	1

Texts

69 C.J.S., Patents:	
Page 720	21
Pages 720-722	26
3 Walker on Patents (Deller's Edition, 1937):	
Section 461, p. 1695 and 1964 Supp. to Vol. 3, p. 62...	13
Section 1685, 1964 Supp., p. 60	10
Pages 1714, 1715, 1722 and 1964 Supp., pp. 82-93	20

No. 21,068

United States Court of Appeals

For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,

Appellant,

VS.

REX L. BRUNSING, et al.,

Appellees.

BRIEF FOR APPELLEES

JURISDICTION

Jurisdiction of the U.S. District Court, Northern District of California, Southern Division is based on U.S.C., Title 28, § 1338(a) because this action arises under the patent laws of the United States. The Jurisdiction of this Court is based on U.S.C., Title 28, § 1291 because appellant's appeal is being taken from a final decision of the District Court. The notice of Appeal was timely filed as set forth in appellant's brief.

STATEMENT OF CASE

Appellee controverts the appellant's statement of the case in the following particulars:

(1) No structure contemplated by either Holmberg or Poupitch "grips" containers carried by them

(2) Holmberg contemplates various handles (PX 1, Column 3, L 43) but not other means for manually grasping the *body* to carry the containers.

(3) Containers enclosed within a Poupitch structure may be freely removed without the necessity of spreading any portion of the clip apart.

(4) Appellees' device is not "like" a Holmberg or Poupitch structure. Only the purpose is the same.

(5) The resilient "tongues" of appellees' structure does not "depend" from the *body* of the clip.

(6) The margins between the tongue and rib in appellees' device define a vertical space which must open vertically in order that the rim of a can may be admitted.

(7) When a pair of cans are mounted in an interdependent set of clips, the cans do abut each other at their bottom edges but do *not* counterbalance each other in the sense that without one can of an opposed pair being present, the other will swing relatively freely depending on the movement to which the body is subjected, as it will in Holmberg or Poupitch.

SUMMARY OF ARGUMENT

There is ample evidence to support the findings of the District Court specified to be error and certainly none is clearly erroneous. Appellees' device is so wholly dissimilar in concept, design, appearance, means, operation and so substantially different in result from any structure contemplated by Holmberg or Poupitch that the only reason for applying the

doctrine of equivalence would be to defeat appellant's claims.

If held to be applicable, the range of equivalence should be extremely narrow as appellant's patents in suit were small improvements in a crowded field, never obtained commercial acceptance and are further limited by the doctrine of file wrapper estoppel.

**APPELLEES HAVE NOT INFRINGED THE HOLMBERG
OR POUPITCH PATENT.**

In appellant's "Statement of the Case," the words "grip" or "gripping" or "grips" appear some five times.

Neither of plaintiff's patents in suit uses the word "grip". In fact, both are titled and rightly so, as "container carrier". The District Court specifically found "... this last is necessary because the structure of the carrier does not grip or hold the chimes or rims of the containers or cans in the sense of applying any gripping pressure to the chimes or rims. . . ." (Findings of Fact XIII, C.T. 278.) Describing the Holmberg structure and "... the carrying operation is achieved in the same manner as Holmberg in that the cans are supported and carried, but not held or gripped together by any positive action of the carrier. . . ." (Findings of Fact XXII, 5 C.T. 285), describing Pouptich structure. In contrast describing appellees' device, the court found "... thus creating a positive gripping action which securely holds the can in the clip regardless of any position in which the clip is

“What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalence, things equal to the same thing may not be equal to each other and, by the same token, things for most purposes different may sometimes be equivalent. Consideration must be given to the purpose for which an ingredient is used in a patent, the qualities it has when combined with the other ingredients, and the function which it is intended to perform. An important factor is where the person reasonably skilled in the art would have known of the interchangeability of an ingredient not contained in the patent with one that was.

A finding of equivalence is a determination of fact. Proof can be made in any form: Through testimony of experts or others versed in the technology; by documents, including text and treatise, and, of course, by the disclosures of the art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. *It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.*” (Emphasis added.)

After briefly reviewing the two welding fluxes involved, the Court went on to say with regard to how the evidence would be weighed as follows (339 U.S. at page 611):

“It is not for this Court to even essay an independent evaluation of this evidence. This is the function of the trial court. And, as we have heretofore observed, ‘to no type of case is this . . . more appropriately applicable than to the one before us where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations.’”

The above quoted language is especially applicable in this case where most of appellant's case was introduced through the testimony of the witness Poupitch. Mr. Poupitch had the classical reasons to be prejudiced and these were brought out immediately on his cross-examination. (R.T. 105-107.) He has been an employee of the appellant for thirty-three years. He owns stock in the appellant corporation. He receives bonuses which in part are dependent upon profits and he admitted that he had a personal interest in the outcome of this litigation. Additionally, he had the pride of authorship if the Poupitch patent 2,923,406, which is the second of appellant's patents in suit. Considering that appellant brought a patent attorney (Mr. Richard Trexler) and Mr. Boret, its vice president, to San Francisco on separate occasions for the depositions held here, for the pretrial conference, and for the trial, it would seem that appellant expended a substantial amount of funds for trial prepa-

ration and trial. We naturally wonder whether or not it was impossible for appellant to find, if it tried, an independent expert to give the same conclusions under oath as did Mr. Poupitch.

It is submitted, therefore, that a substantial issue of credibility was presented at the trial and that the conflicts of testimony were resolved in favor of appellees.

THE U SHAPE IS ESSENTIAL FOR HOLMBERG AND POUPITCH.

Of the eleven claims of Holmberg involved in this litigation, seven (1, 2, 5, 7, 8, 9 and 10) call for "... a body having a U shaped cross section . . ." Appellant contends that the appellees' device does in fact have a U shape in cross section in spite of the trial Court's specific finding to the contrary and without citing any reference to the transcript in support of its position.

Appellees contend that this issue could have been resolved by the District Court without any oral testimony whatsoever merely by viewing the drawings and exhibits and drawing its own conclusions. The oral testimony was by Mr. Poupitch in support of appellant's position and by Mr. Wood in support of appellees'. Mr. Wood gave specific cogent reasons for his opinions (RT 439-445) and it is obvious that this is just one of the conflicts between Mr. Wood's testimony and that of Mr. Poupitch which was resolved by the Court in appellees' favor.

However, Mr. Poupitch conceded that he himself had to disregard a portion of the appellees' structure to see a U shape. (RT 172, 173.)

Q. Now, if you cut that rim engaging means and cross-section, would it also be your testimony it has a U shape?

A. Yes.

Q. Isn't it true that your opinion that the Brunsing device has a U shaped cross-section is based on (1) cutting the can engaging means through and looking at the end and disregarding the rest of the body?

A. That's right.

Finally, it should be noted that this particular language in the seven claims calls for, "... a body having a U shaped cross-section" and *not* a cross-sectional view of the body taken through the openings, slots, or rim engaging means. For a fair and proper comparison the body of appellees' device should be looked at from an end position or a cross-sectional view at some place other than through the can engaging elements. If this were done *not* even Mr. Poupitch would find a U shaped structure as above noted.

The difference in function between the Holmberg structure that resembles a U in cross-section and appellees' device which does not, is marked, and is the heart of this case.

In Holmberg and Poupitch it is necessary that the legs of the U (inverted) be nearly vertical so that the cans when supported by the carrier are nearly vertical. And why a handle associated with the carrier

must be freely moveable. In essence the whole structure must be constructed so that at all times the cans, when supported by the carrier, are in a vertical or nearly vertical position. If they are not, the cans will fall out of a Holmberg or Poupitch structure when the cans reach an intermediate angle to the carrier.

This was demonstrated to the Court. (RT 162.) Appellees' device, of course, firmly grips each can independent of any other can so that the can or cans are firmly retained in appellees' device no matter in what position the device is held. Since appellees' device was designed to firmly grip the cans it, of necessity, looks different, has different means, has different operation, and a different result than the Holmberg and Poupitch carriers which are merely designed to allow one or more cans to "hang on" or be supported or carried loosely by the structures contemplated by the patents. In this instance we think that the form shown in the patent is *necessary to the functions which the patent ascribes to the invention and thus the patent should be limited to the form shown*. (3, Walker on Patents, Deller's Edition (1937) Section 1685, 1964 Supp. p. 60.) In Holmberg's patent specifications great emphasis is placed on the manner of forming the slots. (PX 3, Col. 2 and lines 22-51.)

Poupitch has the same slots although he calls them "throats".

It is the described construction of these slots which restricts the claims to horizontal slots that open vertically and allow free ingress and egress when the cans are at an intermediate angle that shows why there

is no grasping and why the body must be maintained in a vertical or almost vertical position for the carrier to effectively transport cans.

A freely pivotal handle member is also essential for Holmberg and Poupitch for the simple reason that if *any type of a handle is rigidly affixed* to a Holmberg or Poupitch structure, the structure might easily be tipped to an intermediate angle and then all the cans on the downward side would fall out. (RT 162.) The handle member is called for in Claims 4, 11 and 12. Claim 13 calls only for "adapted for manually grasping for carrying the body. . . ." But this must be considered to mean a freely pivotal handle. It is the formation of the slots, the vertical legs of the U that do not diverge and the cooperating freely moving pivotal handle in Holmberg that attempt to insure that the cans remain at a vertical position. (RT 451.) If, in fact, Holmberg or Poupitch gripped a container when a container is carried by a Holmberg or Poupitch structure, there would be no need for a U shaped structure or a cooperating handle member that attempts to insure that the structure will remain vertical or nearly so. We think it is beyond cavil that the Court fully understood this difference in function.

Succinctly stated the patentable novelty in Holmberg as claimed by him (DXV, pp. 32-33) is,

"the character of the holding devices and their spacing so that the cans are held by the upper rim and the downward swinging action brings about an abutment at the bottom edge of the can is included in the claim and thus defines the essence of novelty of the invention."

The lack of any affirmative gripping action under Holmberg is well demonstrated by a specific language of claim one, “. . . the portions below said slots being curved to conform to the contour of the side walls of the containers . . .”. This language contemplates a structure to give added stability to containers which, of course would not be necessary if, the “slot” actually affirmatively gripped the containers. In spite of appellant’s argument to the contrary found on pages 16-17 of its brief, it is submitted that a visual observation of appellees’ device obviously compelled the District Court to conclude simply that appellees’ device “does not have any structure whatever below the vertical openings created by the space between the arcuate tongue and the arcuate central rib”. (Appellees’ device inserted opposite.)

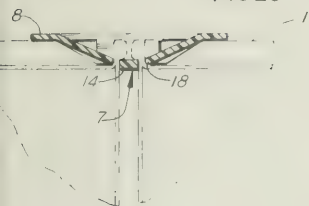
The arcuate central rib, the opposed resilient arcuate tongue and the underside of the coplainer body portion cooperating together produce in the appellees’ device the affirmative gripping action that is nowhere found in Poupitch and Holmberg.

As appellees conceive it the basic issue in any infringement action is whether or not the accused device seeks to “steal(ing) the benefit of the invention”. L. Hand in *Royal Typewriter Co. v. Remington Rand* as cited in *Graver v. Lindy*, 339 U.S. 605 at 608.

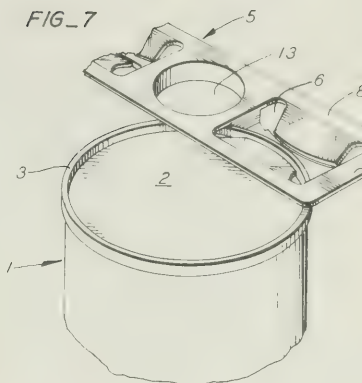
Where, as here, the trial Court finds that “. . . the accused device does not in any way use the idea or principle or teaching of either of plaintiff’s patents in suit, and the Court finds that the means and operation of the accused device are markedly different from those of either the plaintiff’s patents in suit . . .”

APPELJEES' DEVICE

FIG_6



FIG_7



(Finding of Fact XXII (5) CT 284) then the Doctrine of Equivalents will avail appellant nothing for the Doctrine will not be applied or if it is applied in such a case, it will be applied “. . . to restrict the claim and defeat the patentee’s action for infringement.” *Graver v. Lindy*, supra at 609.

THE OMISSION OF AN ELEMENT FROM A COMBINATION PATENT AVOIDS INFRINGEMENT.

The omission from an accused device of one of the elements of a combination patent avoids infringement. “A construction which omits one of the elements claimed as part of a patented combination and does not supply an equivalent, cannot be held to infringe.” *Simons v. Davidson* (9th Cir. 1939) 106 Fed. 2d 518, 3 Walker on Patents, Deller’s Ed. § 461, page 1695 and 1964 Supplement to Volume 3, page 62.

This is true for “. . . if one of the elements is omitted, the thing claimed disappears” *Vaney v. Campbell*, 1 Black (66 U.S.), 427, 430. This doctrine has been recently restated by this Court in the case of *Lockwood v. Langendorf United Bakeries, Inc.* (1963) 324 Fed. 2d 82. The issue was whether the accused metal wire basket infringed the metal wire baskets contemplated by the patent and reissue patent. Appellant suggests that several portions of this opinion are very material to this case as follows: First, after observing the *accused article* and plaintiff’s *patent model* were not similar in structural appearance, although they did accomplish the same result, the Court went on to say at page 86 “Lack of struc-

tural similarity of appearance, although not at all determinative, is a factor for consideration in determining the ultimate question of whether the accused article does in fact so copy and so use the idea, the principle, the teaching of the patent as to accomplish the same result by substantially similar or equivalent means." After holding that the same result was achieved, the Court pointed out at page 88

"Even if a claim can be read in terms upon an accused article, infringement does not necessarily follow unless it can be found as an ultimate fact that the article uses the inventor's idea as embodied in the inventor's design and drawings and that there is sameness or equivalence of function and means." (Citing cases.)

"The mere fact that the accused article performs the same function and achieves the same result as the patented article does not necessarily establish infringement unless it can be found that this is accomplished in substantially the same way and where, as in this case, the art is fairly crowded and the main elements of the patent are found or indicated in prior art, this issue should be determined narrowly rather than liberally. If in fact, not merely colorably, the accused article departs from the teaching of the patents in the means by which it achieves result there is no infringement." (Citing cases.)

"In a combination patent, such as involved in this case, every element of a particular claim is presumed essential and, therefore, every element of the claim, or its functional equivalent, must ordinarily be found in the accused article." (Citing cases.)

“Where, as in this case, no embodiments of the patent asserted by plaintiff has never been produced for commercial use, that circumstance is one calling for a narrow rather than a liberal construction of its claims.” (Citing cases.)

“Also where, as in this case, an applicant has been required to narrow his claim in order to distinguish it, any contention of the appellant that such claim is not essential or that it is infringed by an equivalent in the accused article, should be considered with care and subject to a narrow rather than a liberal construction.” (Citing cases.)

As noted it appears that the doctrine of equivalence will only be invoked when the differences are colorable, slight, or simple. Conversely, if the accused device does not use the principle of the accusing patent, the doctrine of equivalence will only be invoked to defeat the claim of infringement.

Appellant's own cases support this position. *Stewart Oxygen Co. v. Josephian* (1947) 162 Fed. 2d 857. A more complete quote commencing at 861 is as follows:

“... where the particular form is not an embodiment of the principle of the asserted invention, the patent is not restricted to the exact form of the construction shown in the diagrammatical drawing. And a device infringes it if it embodies the essential principles taught by the patent, even though there is a departure from the drawings *to the extent of simple changes which would be readily conceived and made by a mechanic in the*

course of constructing a device on the patent."
(Citing cases [emphasis supplied].)

In the *Stewart Oxygen* case the defendant had purloined plaintiff's mechanic who constructed a device similar in appearance and almost identical in operation with the patented device.

In *Chicago Pneumatic Tool Co. v. Hughes Tool Co.* (1938) 97 Fed. 2d 945, the Court held that the accused device had departed from the disclosure of the patent only to a colorable extent. The Court said specifically

"... a device infringes if it embodies the essential principles taught by the patent, even though there is a departure from the drawings to the extent of simple changes which would be readily conceived and made by a mechanic in the course of constructing a device on the patent." (At page 947.)

Here appellees contend that the reason why Holmberg and Poupitch must have an inverted U shape cross-section and why appellees' structure does not explain the basic differences in concept.

**THE ADDITION OF "SNAP ACTION" ADDS NO SUBSTANCE
TO APPELLANT'S CASE.**

By Mr. Poupitch's own testimony, his patent added only the application to the cans by "snap action". (PX 20, RT 353.)

This, however, is the only difference Mr. Poupitch so admitted. As in Holmberg cans are allowed to pass

freely in and out of his structure when the cans are at an intermediate angle to the carrier. (RT 365, lines 5-11.)

Basically, Holmberg and Poupitch use two can holding elements and only two because the structures have no affirmative gripping power designed into them. Appellees' device has three (and this is where the difference is not merely colorable but basic to the design) and must have three because its device does not merely allow the cans to hang on or in it, but affirmatively grips them. The third element in the appellees' device is the bottom of the coplainer body member which rests on the top of the cans at a substantial and equal distant point from the center of the opposition of the arcuate rib and arcuate tongues. These points define a portion of the arc of the can circle. This was brought out on cross-examination. (RT 203-208.) This third element is, of course, important in maintaining a gripping action and it becomes essential when the device is turned to the angle where the cans will drop out of Holmberg and Poupitch. At these angles it is the abutment of the bottom of the coplainer body means and the tops of the chimes of the cans together with the gripping power between tongue and central ribs that keeps the cans firmly held in the appellees device.

These great differences stated in general terms are not "mere improvements" that are colorable only but of a wholly different concept. This is so in spite of the language of Poupitch claim one which states "... and for subsequently relatively shifting said margins to-

gether for closing said throats and locking the cans and the clip in a simple relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart." The specifications are similar (PX 3, Column 3, lines 50-56), however, it seems clear that this simply cannot be possible if the following language of the specifications is also correct. "It is to be understood that the inherent resiliency of the clip stock material or metal will cause the elements 56 and 58 to spring back to their *original positions* relative to the clip body after these elements have been resiliently flexed outwardly in the manner just described during the application of the clip to the cans." (PX 3, Col. 3, lines 44-50.) (Emphasis added.)

If this plurality of first locking means "... pending from opposite end portions of said body" "... springing back to their original positions. . . ." upon completion of the application process then how can there be any grip applied to the cans?

The District Court found that the Poupitch structures have tabs with shoulders that fit in "... spaces created at opposite ends of the abutment. . . ." and that at the completion of the application of the structure to the cans "... the tabs then snap back to their original positions . . ." (RT 322) and "... However, as demonstrated to the Court, the cans may also be inserted as in Holmberg and removed in the same manner." (Finding of Fact 17, CT 280, RT 354, l. 24-355, l. 17, RT 504, l. 10-506, l. 15.)

This demonstration was made using plaintiff's own exemplar which Mr. Poupitch testified was made by him and which was an accurate representation of the disclosures of his own patent. (RT 86, lines 4-23.)

No part of Finding of Fact 17 has been assigned as error by appellant.

Additionally, Mr. Poupitch admitted that these elements return to their original position “. . . relative to the body” (RT 317, line 25-318, line 5) and after a good deal of sparring he admitted that there was no residual pressure maintained on the cans. Certainly none that is in any way material to the operation. (RT 318, lines 19-22.) “A. There remains a condition of dimensions. If the beads happen to be slightly larger, slightly thicker, there will be a residual pressure against the two side elements.”

In other words, by happenstance a Poupitch structure *might* apply some infinitesimal gripping action to a can, if the can rim were larger than the manufacturer's tolerance.

After a great deal of probing Mr. Poupitch finally admitted that if an appellees' resilient member does not return to its original position pressure would be applied. (RT 328, line 14-RT 329, line 6, also RT 329, line 7, line 18.)

Finally and conclusively after discussing gripping and pressure to RT 341 it was demonstrated to the Court that in appellees' device the cans literally “. . . stand on edge” when resting on a surface without any external pressure being applied to the appellees' clip

—such as Mr. Poupitch's hand (RT 341, line 14-RT 342, line 21.)

No exemplar brought to Court by appellant could or did produce any such pressure or gripping action and neither can any structure contemplated by appellant's patents.

Even if we were to concede hypothetically and only for the purposes of this brief that the Poupitch claims do provide for a structure that to some insubstantial degree grip the chimes of the cans still appellees' device could not be held to infringe. This is because the means and operation are basically different and the Courts will not apply the Doctrine of Equivalents in these instances.

This principle is fully set in *Boyden Power-Brake Co. v. Westinghouse* (1897) 18 S.Ct. 707 at 722, which itself refers to the very early case of *Burr v. Duryee*, 1 Wall. 351. The Court goes on to say at 723:

“But, after all, *even* if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, *or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function.*” (Emphasis added.)

3 Walker on Patents, Deller's Ed. 1714, 1715, 1722 and 1964 Supplement pp. 82-93.

**THE DOCTRINE OF FILE WRAPPER ESTOPPEL IS
APPLICABLE TO HOLMBERG AND POUPITCH.**

The file wrappers for patent histories of each of the patents were introduced into evidence. (DXU and DXV, RT 532.) In each various claims were amended and abandoned. The effect of amendments or abandonments is stated in Corpus Juris Secundum as follows,

“Where an applicant in response to rejections by the patent office amends his patent claim by cancelling the objectionable features of claims, or by introducing new elements or limitations, the claims as allowed must be interpreted with reference to those claims which have been cancelled or rejected, and the allowed claims cannot be construed to have the same meaning which they would have had without amendment.” (69 C.J.S., Patents, page 720.)

Holmberg cancelled some eight claims, three describing structure and five method, but more importantly the applicant himself stated (DXU pp. 32-33):

“The character of the holding devices and their spacing so that the cans are held by the upper rim and the downward swinging action brings about an abutment at the bottom edge of the can is included in the claim and thus *defines the essence of novelty of the invention.*”

Since it was fully shown to the District Court's satisfaction that appellees' device does not embody appellant's “essence of novelty” the total lack of infringement could be affirmed on this point alone.

In the Poupitch file wrapper (DXU p. 1) and in the Poupitch patent (PX 3) it is stated, "A further object of the present invention is to provide a novel carrier of the above described type wherein a plurality of the novel clips may be connected to a handle member formed from suitable sheet-stock, such as paper, cardboard and the like, thereby enabling a single handle structure to support a plurality of groups of adjacently positioned cans or containers." Figure 8 discloses a handle folded flat as part of an overlying cardboard structure. In addition (DXU p. 6) the applicant when discussing his drawings stated "In order to enable the clip 28 to be connected to the handle member 26, a pair of tabs or prongs . . ." In the original claims applied for, claim 14 (DXU p. 17) specifically called for ". . . a sheet material handle member".

The patent examiner rejected claim 14 (DXU p. 25) and the applicant did not amend it instead arguing for the allowance at some length. (DXU p. 31.) The examiner again rejected it at page 34 setting forth authority for his statement that no invention is shown by providing a handle for any article. In the applicant's next communication (DXU p. 36) claim 14 was cancelled.

Appellant contends that the District Court erred in applying file wrapper estoppel to the Poupitch claims on the ground that the cancelled claim (14) was "... to a different subject matter is directly contrary to this Court's decision in *Payne Furnace & Supply Co. v. Williams-Wallace Co.* (9 Cir. 1941), 117 F.2d

823, cert. den. 313 U.S. 572, where it held, page 828: ‘. . . The rejected claims were for different combinations, and as we understand it any estoppel could extend no further than to the cancelled combinations. *Johnson Co. v. Philad Co.*, 9 Cir., 96 F.2d 442, 444.’ ” Plaintiff-appellant’s opening brief at page 30.

The *Payne Furnace* case simply does not in any manner support this position. The *Payne* case dealt solely with validity because it was conceded that the patent, if valid, was infringed.

In the *Payne* case, “. . . Appellant with Stadtfeld’s work before it, has manufactured and put on the market an exact copy, and in its advertising material has proclaimed as novel the features relied on by the patentee as disclosing invention.” (*Payne Furnace & Supply Co. v. Williams-Wallace Co.*, supra at page 825.)

The case turned upon the construction of a disclaimer made after issue was joined in the lawsuit, not upon the cancellation of any claim in the Patent Office. As a matter of fact this Court said, “. . . We doubt the disclaimer was necessary, . . .” and characterized it as, “. . . innocuous gesture” (at page 828). The quote in Appellant’s brief was unnecessary to the decision and related to claims rejected by the Patent Office which did *not* include “. . . the feature of slidability of the inner pipe, and claim 8 contained neither the element of insulation nor the slidability feature.” (at page 828.)

In this case a simple comparison between the rejected claim 14 in Poupitch (DXU, page 17) and the

Poupitch claims in suit show that they most certainly are "like" claims 1 and 2, which were allowed.

Firstly, the abandoned claim 14 includes within it ("... as defined in claim 8...") the abandoned claim 8. (DXU page 14.)

The same elements are claimed for both:

1. A one piece sheet material clip;
2. A generally horizontal body for substantially traversing a space between the cans laterally of an area of substantial abutment of the cans;
3. First locking means having shoulders for engaging beneath the rims of the cans;
4. Second locking means for engaging the inner surfaces of the can rims and for cooperating with the first locking means;
5. The margins of the first and second locking means defining a throat;
6. The resilient flexible feature for spreading the throat when the clip is applied as set forth in the specifications;
7. The "snap action" feature;
8. The claimed locking feature.

Thus claim 14 which includes by definition claim 8 was for the same features as claims 1 and 2 except for the handle feature.

Mr. Poupitch tempted to draw a clip that would come under the teaching of his patent and that would hold more than two cans (RT 213-221 DXI). His

failure was total because he could not possibly design a clip for more than two cans within the disclosures of his patent, for the simple reason that no such clip for more than two cans could be formulated in view of the claim language “. . . first locking means integral with and depending from opposite end positions of said body means . . . and a plurality of second locking means integral with said body means having portions located toward opposite ends and depending from said planar body means. . .” It should be noted that the “. . . depending from opposite end portions . . .” was the third set of amendments occurring at DXU, p. 35.

Also the examiner first objected to claim 1 among others because they were vague, indefinite and functional and because it inferentially included a plurality of cans. (DXU p. 35.)

After amendments the Trexler Firm elected “. . . to prosecute claims drawn to the specifications shown in figures 1-3 pending the allowance of a generic claim in this application.” (DXU page 32.) Of course, figures 1 to 3 in the patent show only one clip which supports only two cans.

If the Poupitch structure could have a bowed body portion, as applied for in claim 4 (withdrawn by the examiner, DXU page 40), at the conclusion of the “snap action” the resilient members might not return to their original positions, and some residual pressure might be applied to the cans. Since claim 1 only calls for a planar structure and the specifications point out that at the conclusion of the snap action the members

do return to the original position, no gripping pressure can possibly be applied by the Poupitch structure.

Mr. Wood's testimony was that appellees' device simply has no structures whatever in the spaces created at opposite ends of the abutment of two cans. (RT 489-501.)

It should be noted that Finding of Fact 15 has not been cited as error.

Nor can appellant use the Doctrine of Equivalents to recapture features of claims that have been abandoned or amended and cannot ask for broad construction. 69 C.J.S. pp. 720-722 and cases there cited.

**THE PRIOR ART RESTRICTS THE CONSTRUCTION OF THE
HOLMBERG AND POUPITCH CLAIMS.**

Appellant on page 31 of its brief cites two questions and answers during Mr. Wood's direct examination and thereafter makes the bald statement that, "There was no further testimony on the prior art during the trial."

In fact, Mr. Wood commenced to testify with regard to the prior art at RT 513-A and continued to line 5 of page 522 of the Reporter's Transcript.

Mr. Wood testified briefly but clearly as to Jung, Keith, Kratzer, Selig, and Curtis as well as the testimony cited by appellant. Appellant introduced no testimony whatsoever to controvert Mr. Wood on this point and we think it is beyond argument that

it was up to the Court to determine from the testimony and from the patents what was in fact the state of the prior art.

The effect of a crowded field and only a small improvement therein in the construction to be applied to a plaintiff's claims has been stated in this circuit, *Air Devices, Inc. v. Air Factors*, 210 Fed. 2d 481 at 482. Additionally, this case reiterates that identity of results settles nothing regarding infringement and that a difference in means to accomplish the same result avoids infringement. (at 483.)

**THE LACK OF COMMERCIAL UTILITY AND ACCEPTANCE ACTS
TO RESTRICT THE CONSTRUCTION OF THE HOLMBERG
AND POUPITCH CLAIMS.**

Appellant argues commencing on page 32 of its brief that appellees have commercialized appellant's patents. This argument assumes that appellant is entitled to ignore the District Court's finding that appellees have in no way used appellant's inventions.

However, Mr. Poupitch testified (RT 127-129) that very few were made and that if any application machine had been designed or built since 1949 to the day of trial to apply the patented devices he would know about it. He did not know of any such machine. Additional support is found in Mr. Holmberg's testimony. (RT 139-140.) The testimony was clearly presented to the Court on the issue of what range of equivalents, if any, were to be accorded the claims. (RT 127, line 17-RT 128, line 9.)

Neither was Poupitch commercialized. (RT 303-304.)

Appellees submit that where the trial Court finds *both* that the patent sued on is not a pioneer patent or a marked improvement and has not been commercialized the trial Court is then justified in applying a narrow rather than a broad range of the Doctrine of Equivalents. *General Motors v. Kesling*, 164 Fed. 2d 824, Cert. Denied 333 U.S. 855, 92 L. Ed. 1135.

Smith v. Mid-Continent Inv. Co. (8 Cir. 1939) 106 F2d 622 simply does not support appellant's contention. In the *Smith* case the Court pointed out at the commencement of the Opinion (*Smith v. Mid-Continent Inv. Co.*, supra at page 624), "The accused construction and the commercial construction of plaintiff are so alike that no point is made of any differences to avoid infringement. Defendant's position is that plaintiff's commercial construction is outside the patent. Therefore, the contest is whether the patent is broad enough to cover the commercial construction. This question is one of the scope of the patent."

The plaintiff patentee had placed his thermostat for a furnace in the "breaching" of the furnace instead of in the "combustion space heated by said combustion pot", as indicated in the claims.

The Court held that locating the thermostat in the "breaching" was within the patent because it was common knowledge to those skilled in the art that such a location would be the functional equivalent of placing the thermostat in the combustion pot and hence

the patentee's commercial construction was within his patent and thus his patent was not "paper". See especially headnote (17) found at page 631 of the Opinion.

In this case, however, appellant has made no commercial construction of any kind that comes within the teachings of either Holmberg or Poupitch.

Appellees agree that "paper patents" are entitled to protection but it cannot be argued that this protection in a crowded field should be broad rather than narrow. An accused device would have to be similar in form and there would have to be identity of means, operation and result before such a device would infringe either of the patents in suit. As demonstrated to the Court, none of these elements exist.

**THE ACCUSED DEVICE LACKS ESSENTIAL ELEMENTS OF
EACH OF APPELLANT'S CLAIMS IN SUIT.**

Mr. Wood testified in detail as to the structures called for by the individual claims of both Holmberg and Poupitch. (RT 432-534.)

Obviously, the Court was impressed with Mr. Wood's testimony, the demonstrations, and the various objects of real evidence introduced by defendant.

This testimony clearly supports the Findings No. XIII, XXI, and XXII. *Lockwood v. Langendorf*, 9 Cir. 1963, 324 Fed. 2d 82.

CONCLUSION

In conclusion, the appellees' device is not an "improvement" over Holmberg and Poupitch. It is an entirely different concept of carrying a multiple number of cans independently and securely gripped by the structure itself. It does not resemble Poupitch or Holmberg. It does not have the same means. The operation is different and so is the result.

Appellees respectfully submit that the District Court should be affirmed in all particulars.

Dated, San Rafael, California,

February 3, 1967.

Respectfully submitted,

LOUIS F. HAWKINS,

HAWKINS & HAWKINS,

Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LOUIS F. HAWKINS,

Attorney for Appellees.

(Appendix Follows)

Appendix

July 28, 1953

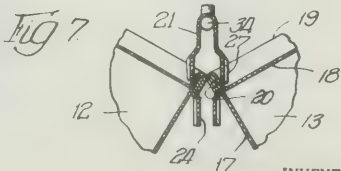
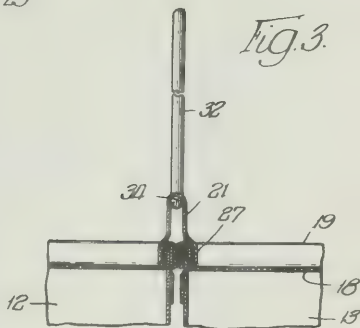
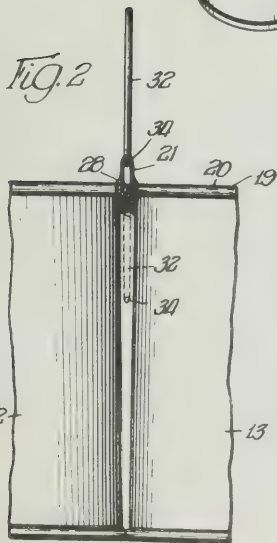
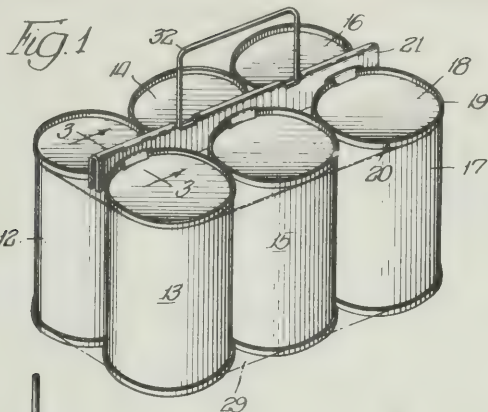
L. O. HOLMBERG

2,646,911

CONTAINER CARRIER

Filed Aug. 19, 1949

2 Sheets-Sheet 1



INVENTOR.
Lawrence O. Holmberg,
BY

Wilkinson, Huxley, Byron & Hume
ATTORNEYS

July 28, 1953

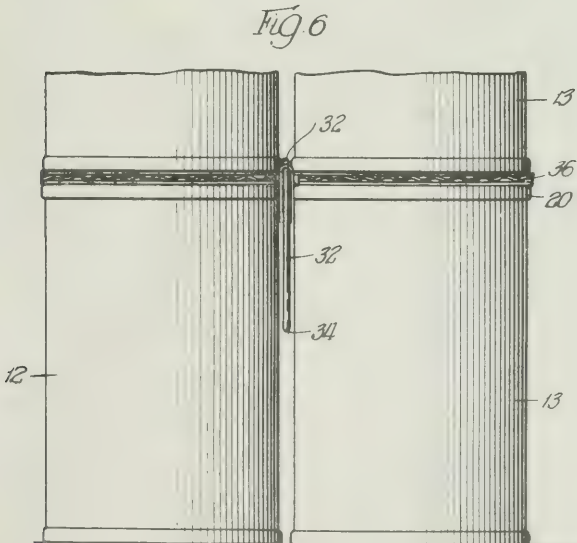
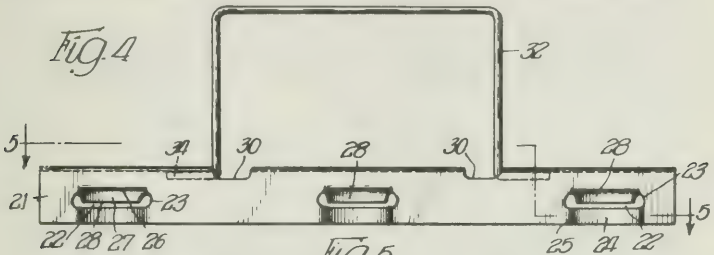
L. O. HOLMBERG

2,646,911

CONTAINER CARRIER

Filed Aug. 19, 1949

2 Sheets—Sheet 2



INVENTOR.

Lawrence O Holmberg,

BY

Kilkinson, Hurley, Byron + Humphreys

Patented July 28, 1953

2,646,911

UNITED STATES PATENT OFFICE

2,646,911

CONTAINER CARRIER

Lawrence O. Holmberg, Winnetka, Ill.

Application August 19, 1949, Serial No. 111,143

13 Claims. (Cl. 224-45)

1

This invention relates to a new and improved container carrier and more particularly to a carrier for cans or other containers having projecting rims, edges, joints or flanges such as end seams or the like, or countersunk or recessed ends.

An object of the invention is to provide a carrier which will support a plurality of grouped containers in such a manner that labels or advertising matter on the exterior of the containers may be clearly displayed.

Another object is to provide a carrier that will support a plurality of grouped containers in such a manner that a single strip of advertising material may be placed about the group.

A further object is to provide a carrier which occupies a minimum of space and which may be placed in supporting engagement with a plurality of containers and the standard number of containers placed in the usual shipping case, making it possible to install the carriers along with supplemental advertising material at the point of initial packing.

Another object is to provide a carrier which may be quickly attached to or removed from a plurality of containers and which is simple in construction and economical to manufacture.

It is a further object to provide a carrier which engages only the top edge portions of said containers.

It is another object to provide a carrier with a retractable handle.

It is a further object to provide a carrier on which containers may be installed by automatic machinery.

With these and various other objects in view, the invention may consist of certain novel features of construction and operation as will be more fully described and particularly pointed out in the specification, drawings and claims appended hereto.

In the drawings, which illustrate an embodiment of the invention and wherein like reference characters are used to designate like parts—

Fig. 1 is a perspective view of a group of containers with a carrier in operative position and a band shown in broken lines encircling the group;

Fig. 2 is an enlarged fragmentary end elevation of a carrier supporting containers;

Fig. 3 is an enlarged fragmentary cross-section taken on the line 3—3 of Fig. 1;

Fig. 4 is an enlarged side elevation of a carrier;

Fig. 5 is a view taken on the line 5—5 of Fig. 4;

2

Fig. 6 is a fragmentary end elevation showing the relative position of containers and carrier when they are packed in a two-layer packing case; and

Fig. 7 is an enlarged fragmentary cross-section taken on the same line as Fig. 3 and showing containers in their initial position when being installed on a carrier.

Referring to the drawings more in detail, Fig. 1 shows a carrier with six containers 12 to 17 secured to it. The containers illustrated have projecting rims and their ends 18 are countersunk and have annular rims or flanges that have vertically projecting edges 19 and laterally projecting portions 20. The body portion 21 of the carrier may be produced from a sheet metal blank or other material and is substantially U-shaped in cross-section. Oppositely disposed slots 22 are formed in the body 21 at spaced intervals. These slots are the same and, therefore, only one will be described.

In forming these slots, a relatively narrow elongated portion of material is removed from the side of the body 21. The width of the slot is substantially less than the height of the flange or bead 20. Round portions are removed from the ends of the slots to form the curved portions 23, as shown in Fig. 4. These curved portions extend upward and outwardly from the bottom edge of slot 22. The diameter of the curved portion is approximately the same as the height of the rim or bead 20. The portion of the body member immediately below the slot 22 and between the rounded end portions is curved to conform to the side wall of the container, as shown in Fig. 5. In forming this portion, the material is moved outwardly beyond the plane of the side of the body 21 and then curved inwardly, as shown at 24 in Fig. 5. The material at the ends of the curved portion projects beyond the plane of the body member, as shown at 25.

The material above slot 22 is bent outwardly along a line 26 in the plane of the tops of curved portions 23 to form an overhanging lip 27, the outer margin of which is bent downwardly at 28. This lip is curved to conform to the contour of the inner surface of rim 20. As shown in Fig. 4, the planes of the upper and lower margins of the slot are spaced less than that of the height of rim 20 and are also less than the thickness of the rim. The rim of the container, therefore, cannot be inserted in the slot when both the container and body of the carrier are in vertical positions, nor can it be inserted when the container is at right angles to the carrier. It is

3

necessary that the rim be inserted when the container is at an intermediate angle, and after the rim has been inserted the container is placed in a vertical position. In this position, pressure downward or sideways will not dislodge the rim from the slot.

As shown in Fig. 7, in securing a container to the carrier, the edge 19 of the top flange of the container must be disposed at an angle to body member 21 and slot 22 in order for it to be able to pass through the slot. The top of flange 19 is moved upwardly and inwardly until it engages the top of rounded portions 23, at which point the under margin of rim 20 has passed over the lower curved margin of the slot. The container may then be moved to a vertical position and the upper lip 27 will engage the inside of flange 20, holding it inwardly so that the lower outer margin which is supported by the lower curved margin of the slot will not become dislodged.

Fig. 7 shows containers 12 and 13 tilted inwardly with their top rims 20 inserted in oppositely disposed slots at the same time. Automatic machinery may be used for installing the containers on the carrier and any number of containers may be tilted and their top rims inserted in slots at the same time. The containers may then be moved to the upright position shown in Fig. 3 which locks the rims in the slots. The contour of the carrier adjacent the slots may be such that when the containers are moved to an upright position the material of the carrier is displaced at these points, causing the containers to be more securely held by the carrier; that is, portions 27 may be moved outwardly by the inside of rims 20 and the portions 24 moved inwardly by the sides of the containers below the rims. The containers may be tilted, seated and locked on the carriers on a conveyor line and, if desired, the carrier may be in a continuous strip which is cut with the desired number of containers in each unit.

Various handles may be used and, in the one illustrated, the top of the body member 21 is provided with a pair of elongated openings 30 into which the ends of a handle or bale 32 are inserted. The handle may be made of drawn wire and shaped before it is installed. The ends 34 are bent horizontally and extend under the top of the body portion 21. The elongated openings 32 enable the handle to be sprung inwardly sufficiently for the ends 34 to be inserted and, when the handle returns to its normal shape, the side portions about the ends of the openings. As shown in Fig. 6, the handle may be retracted by merely pushing it inwardly. This is particularly desirable where the containers are packed in cases with the carriers installed on the containers. Where the containers are packed in more than one layer, a piece of corrugated board 36 may be placed between the layers and provided with an elongated slot into which that portion of the carrier which projects above the container may be inserted. Where groups of containers secured to carriers are stacked without the corrugated board between the layers, the portion of body member 21 projecting above the containers extends between the bottoms of the containers stacked on top of them and tends to stabilize the entire stack by preventing the containers above from slipping sideways off of the ones below.

The slots 22 in body member 21 are oppositely disposed so that an even number of containers will balance the carrier. As shown in Fig. 2,

4

when the containers are lifted by the carrier the bottom margins of oppositely disposed containers engage each other. When the bottoms of the containers are supported, the containers assume a normal upright position, as shown in Fig. 6.

Several containers may be handled as a single unit on this carrier and a single strip of advertising material, shown at 29 in broken lines in Fig. 1, may be placed around the entire group calling attention to a special price for the group, or six different varieties of a product may be offered as a special attraction. This material may be applied after the containers are positioned in the carrier at the initial packing point. While such a strip of material is in no way essential to the successful operation of the carrier, it may serve to hold the containers more closely together under unusually rough handling.

The containers will not become dislodged from the carrier when it is swung by the handle sideways or endwise, nor will normal jostling or shaking cause them to become disengaged from the carrier.

While the carrier has been described and shown as having a U-shaped body portion, it is apparent that a single strip of material could be used with the container engaging slots in staggered relation and a handle suitably secured to the body.

The invention is not to be limited by the exact embodiment of the device shown, which is merely by way of illustration and not limitation, as various other forms of the device will, of course, be apparent to those skilled in the art without departing from the spirit of the invention or the scope of the claims.

I claim:

1. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, the portions below said slots being curved to conform to the contour of the side walls of the containers and portions of said body along the bottom edges of said slots providing supports for said rims, the portions above said slots being curved to conform to the inner surfaces of said rims and positioned to engage said inner surfaces when said rims are supported along said lower edges.

2. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed horizontal slots in the sides thereof, the portions of said sides below said slots being curved to conform to the contour of the side walls of the containers, the portions of said sides above said slots overhanging said first named portions and being curved to conform to the contour of the inner surfaces of said rims.

3. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section, oppositely disposed horizontal slots in the sides of said body, portions of said sides below said slots being positioned to engage the sides of said containers and having a surface conforming to the contour thereof, portions of said sides above said slots overhanging said first named portions for engaging the inner surfaces of said rims, spaced slots in the upper margin of said body and a retractable handle having its side portions slidably mounted in said slots.

4. A carrier for containers having projecting top rims comprising a body having slots in the sides thereof for receiving said rims, body portions along the bottom edges of said slots being

2,646,911

5

positioned to supportingly engage the under surfaces of said rims, body portions along the top edges of said slots being positioned to engage the inner surfaces of said rims and maintain the under surfaces of said rims in engagement with the body portions along the lower edges of said slots and a handle for lifting said body portion with said containers secured thereto.

5. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in the sides thereof, said body having round cut-out portions at the ends of said slots, the diameter of said round portions being greater than the width of said slots, body portions along the bottom edges of said slots shaped to conform to the contour of the surfaces of the side walls of said containers, body portions above said slots and between said rounded portions overhanging said second named portions shaped to conform to the contour of the inside surfaces of said rims and the edges of said slots being spaced to permit the insertion of said rims when the latter are disposed at an acute angle to the sides of said body.

6. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers, said body having openings in the upper margin thereof for receiving the ends of a handle member and means between the sides of said body for maintaining said ends in said openings.

7. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having oppositely disposed slots in its sides for receiving portions of the rims of said containers, the portions of said body along the lower edges of said slots being positioned to support the under surfaces of said rims and portions along the upper edges positioned to engage the inner surfaces of said rims whereby the lower margins of opposite containers abut each other when said carrier is supporting the containers.

8. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having a plurality of spaced slots in each side thereof, the distance between the centers of the slots corresponding to the diameter of the containers and the slots in each side being aligned with each other whereby the lower margins of opposite containers abut each other when said containers are supported by their top rims in said slots.

9. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section and having spaced slots in each side thereof, the slots in each side being aligned with each other, whereby when said containers are supported by the under surfaces of their top rims the lower margins of opposite containers will abut each other and said containers will be supported in a substantially upright position by said carrier.

10. A carrier for containers having projecting top rims comprising a body having a U-shaped cross-section, rim engaging means on each side of said body in alignment with each other whereby the lower margins of opposite containers abut each other when said containers are supported on said body by their top rims.

11. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely

6

disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position.

12. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member having handle means associated therewith, a pair of oppositely disposed can-holding devices carried by said body member, each of which is adapted to engage one can, respectively of a pair of cans, at that portion of the top rim thereof which is disposed in close proximity to the other can, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said outside can engaging means, said inside and outside can engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can engaging means when the cans are swung downwardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

13. A carrier for sealed cans or like containers having a laterally projecting top rim thereon, said carrier comprising a body member including means adapted for manual grasping for carrying the body and a pair of independent can-holding devices each of which is adapted to engage the top rim of one can, respectively, of a pair of cans, each can-holding device having outside can-engaging means engaging the underneath edge of the laterally projecting top rim of its associated can, and inside can-engaging means engaging the inside surface of said top rim at such location thereon as to oppose the engagement of said out-

2,646,911

7

side can-engaging means, said inside and outside can-engaging means being constructed to provide therebetween space for said rim sufficient to permit a can held thereby to swing downwardly by gravity to an extent to cause the cans of a pair of cans held thereby to swing toward each other until each contacts the other adjacent the bottom edge thereof and so that each can of said pair of cans counterbalances the other and arrests further gravitational movement thereof, said inner and outer can-engaging means being sufficiently close together at the point of their closest approach to prevent the rim of the associated can from disengaging itself from said outer can-engaging means when the cans are swung down-

8

wardly in mutually supporting position, and sufficiently spaced to permit the outward passage of the rim of the associated can therebetween when the can is tipped upwardly in opposition to the action of gravity.

LAWRENCE O. HOLMBERG.

References Cited in the file of this patent
UNITED STATES PATENTS

10	Number	Name	Date
	1,973,568	Keith	Sept. 11, 1934
	2,117,405	Curtis	May 17, 1938
	2,228,859	Vannucci	Jan. 14, 1941
	2,405,753	Morgan	Aug. 13, 1946
15	2,519,149	McWethy	Aug. 15, 1950

Feb. 2, 1960

O. J. POUPITCH
CONTAINER CARRIER

2,923,406

Original Filed Oct. 30, 1950

Fig. 1.

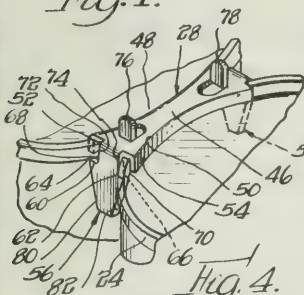


Fig. 4.

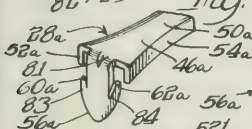


Fig. 6.

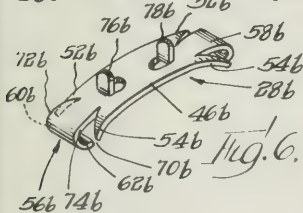


Fig. 9.

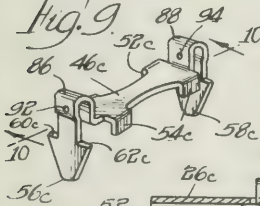


Fig. 11.

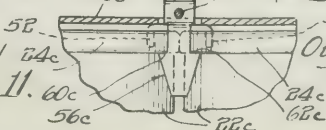


Fig. 2.

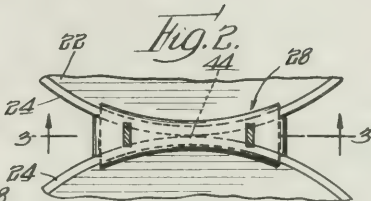


Fig. 3.

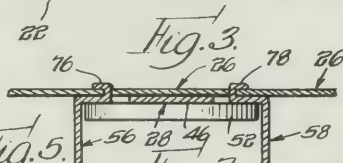


Fig. 5.

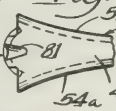


Fig. 7.

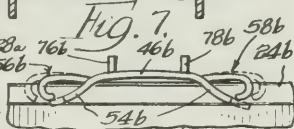


Fig. 8.

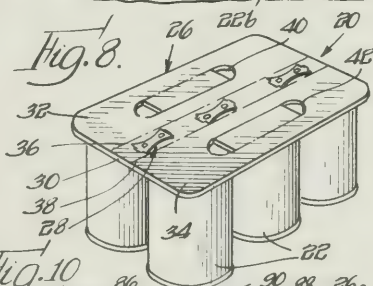
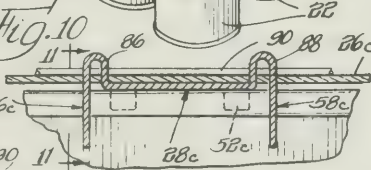


Fig. 10.



INVENTOR

Ougljesa Jules Poupitch

BY

Olson & Trexler

attys

United States Patent Office

2,923,406

Patented Feb. 2, 1960

1

2,923,406

CONTAINER CARRIER

Dagljesa Jules Poupitch, Itasca, Ill., assignor, by mesne assignments, to Illinois Tool Works, Chicago, Ill., a corporation of Illinois

Original application October 30, 1950, Serial No. 192,921. Divided and this application September 19, 1956, Serial No. 610,772

4 Claims. (Cl. 206—65)

The present invention relates to a novel carrier for containers or the like, and more particularly to novel carriers adapted to be applied to end beads or rims of cans such as those commonly used for beverages, foodstuffs and the like for retaining the cans in a compact, rugged package. This application is a division of my co-pending application Serial No. 192,921, filed October 30, 1950, now abandoned.

An important object of the present invention is to provide a novel can or container carrier for retaining a plurality of cans in a rugged package adapted to be easily handled or carried, which carrier includes a novel clip structure adapted to be easily and economically produced from sheet stock, as for example, sheet metal, and adapted to be readily and securely applied to adjacent end rims or beads of a plurality of containers or cans disposed in side-by-side parallel and substantially abutting relationship.

A more specific object of the present invention is to provide a novel one-piece sheet material clip of the type mentioned above which is adapted to be resiliently snapped onto a plurality of rims of adjacent containers in a manner which provides a positive interlock between the clip and the containers so as to prevent subsequent removal of the containers until portions of the clip have been spread apart.

A further object of the present invention is to provide a novel carrier of the above described type wherein a plurality of the novel clips may be connected to a handle member formed from suitable sheet stock, such as paper, cardboard and the like, thereby enabling a single handle structure to support a plurality of groups of adjacently positioned cans or containers.

Other objects and advantages of the present invention will become apparent from the following description and the accompanying drawings wherein:

Fig. 1 is a fragmentary perspective view showing a clip incorporating the features of the present invention assembled with a pair of cans disposed in side-by-side substantially abutting and parallel relationship;

Fig. 2 is a fragmentary plan view of the structure shown in Fig. 1;

Fig. 3 is a fragmentary sectional view taken along line 3—3 in Fig. 2 and further showing the clip connected to a handle member;

Fig. 4 is a fragmentary perspective view showing a modified form of the present invention;

Fig. 5 is a fragmentary plan view of the clip shown in Fig. 4;

Fig. 6 is a perspective view showing another modified form of the present invention;

Fig. 7 discloses the manner in which the clip of Fig. 6 is applied to rims of adjacently disposed containers;

Fig. 8 is a perspective view on a reduced scale showing a package including a plurality of cans or containers disposed in side-by-side substantially abutting and parallel relationship and a carrier having a sheet material handle

2

member and a plurality of clips connected to the handle member and to rims of the cans;

Fig. 9 is a perspective view showing a further modified form of the present invention;

Fig. 10 is a sectional view of the clip taken along line 10—10 in Fig. 9 and further shows the clip applied to a handle member and to a container; and

Fig. 11 is a fragmentary sectional view taken along line 11—11 in Fig. 10.

Referring now more specifically to the drawings wherein like parts are designated by the same numerals throughout the various figures, a package 20 incorporating the features of the present invention is shown in Figs. 1, 2, 3 and 8. In the embodiment shown, the package comprises six cans 22 disposed in side-by-side substantially abutting and parallel relationship, which cans may be of known construction and have annular beads or rims 24 at their ends. A handle structure 26 is connected to the upper end rims of the cans by a plurality of clip members 28 constructed in accordance with the present invention. The handle 26 is preferably formed from sheet material such as heavy paper, cardboard and the like and includes a central longitudinally extending body portion 30 and side flaps 32 and 34 integrally joined to the body portion along bend lines 36 and 38. The side flaps are provided with finger openings 40 and 42. The handle member is initially formed in a flat condition as shown in Fig. 8 so that a plurality of the packages may be stacked upon each other to facilitate storing or shipping, and when the handle structure is to be used for carrying the package it is merely necessary to fold the flaps 32 and 34 into upstanding positions so that the finger slots 42 and 44 are aligned.

The clip 28 is shown in detail in Figs. 1, 2 and 3 and it will be appreciated that this clip is of one-piece construction and is formed from sheet material such as resilient sheet metal. The clip adapted to be applied to a pair of the cans 22 disposed in parallel relationship and substantially abutting each other at the area indicated by the numeral 44. The clip includes a substantially flat horizontal body portion 46 which traverses the spaces defined between the cans laterally of the area of substantial abutment. In this embodiment, the body portion 46 is provided with arcuate side margins 48 and 50 which are to be located adjacent the rims of the cans 22 and which have a curvature complementary to the curvature of the annular rims. Depending from the arcuate margins 48 and 50 are arcuate flanges 52 and 54 respectively which are adapted to extend along and engage with broad arcuate surface contact the inner surfaces of the can rims. The flanges 52 and 54 have a height substantially equal to the height of the can rims so that their free margins will substantially abut the tops of the cans.

Locking elements or means 56 and 58 depend from the body portion 46 so that they are adapted to enter the spaces between the adjacent cans and cooperate with the locking means or flanges 52 and 54 for securely and positively interconnecting the clip with the cans. The elements 56 and 58 are identical but oppositely disposed and each is arranged so that it is in a plane substantially perpendicular to the plane of the body portion 46 and also traversing the flanges 52 and 54 so that the elements 56 and 58 traverse the spaces between the cans. Each of the elements 56 and 58 is provided with oppositely disposed and upwardly facing surfaces or shoulders 60 and 62 adapted to extend beneath adjacent can rims. These shoulders or surfaces have sufficient extent so that they will substantially completely traverse the downwardly facing outer surfaces of the can rims and so that their outermost free margins 64 and 66 will substantially abut side surfaces of the cans when the clip is fully applied to the cans. It is to be noted that the outer ends or

margins 64 and 66 of the shoulders cooperate with the free margins of the depending locking means or flanges 52 and 54 respectively to provide narrow throats 68 and 70 through which the rims of the cans cannot pass until the cooperating margins of the shoulders and flanges have been spread apart. The locking means or elements 56 and 58 also provide oppositely facing upstanding abutment surfaces 72 and 74 adapted to engage the outer upstanding peripheral surfaces of the can rims and to cooperate with the upstanding surfaces of the flanges 52 and 54 for restraining tilting of the cans with respect to each other in a plane disposed transversely to the longitudinal axis of the clip. It is to be noted that twisting of the cans relative to each other in planes generally parallel to the longitudinal axis of the clip is effectively restrained by engagement of the locking shoulders and cooperable portions of the flanges 52 and 54 with arcuately substantially spaced areas of the can rims.

In order to enable the clip 28 to be connected to the handle member 26, a pair of tabs or prongs 76 and 78 is struck upwardly from the clip body portion. As shown best in Fig. 3, these prongs are adapted to extend upwardly through slots in the handle member 26 and to be folded over for securely connecting the clip to the handle member.

When applying a clip 28 to a pair of cans, the cans are first disposed in substantially abutting parallel relationship. Then the clip is arranged over and in alignment with the cans so that upon relative movement of the cans and the clip together, the flanges 52 and 54 will be positioned over and in engagement with the inner rim surfaces. However, before the flanges engage the cans, the depending ends of the elements 56 and 58 will engage the rims of the cans. The depending end portions of these elements below the shoulder surfaces are provided with converging opposite edges or cam surfaces 80 and 82 which are disposed with respect to each other so that the free ends of the elements 56 and 58 may easily enter the spaces between the substantially abutting cans. Upon further relative downward movement of the clip with respect to the cans, the cam surfaces 80 and 82 engage the rims and cause the elements 56 and 58 to be flexed outwardly sufficiently to enable the shoulders 60 and 62 to be snapped into position beneath the rims. It is to be understood that the inherent resiliency of the clip stock material or metal will cause the elements 56 and 58 to spring back to their original positions relative to the clip body after these elements have been resiliently flexed outwardly in the manner just described during application of the clip to the cans. After the clip and the cans have been fully assembled, the cans are positively retained in interlocked association with the clip and cannot be removed until either the flanges 52 and 54 or the elements 56 and 58 have been manually shifted outwardly in order to open the restricted throats 68 and 70 sufficiently to permit the rims to pass therethrough. It will also be appreciated that the structure of the clip 28 is such that a plurality of the clips may be connected to a handle member as shown in Fig. 8 and then simultaneously applied to a plurality of pairs of cans.

Figs. 4 and 5 show a modified form of the present invention which is similar to the above described structure as indicated by the application of identical reference numerals with the suffix "a" added to corresponding elements. In this embodiment, the locking element 56a is formed so that it is provided with an arcuate or channel-shaped transverse cross section whereby its strength and rigidity is materially increased. An indentation 81 at the juncture of the element 56a and the body portion 46a serves to increase the resistance of the element 56a to outward deflection. It is to be noted that the element 56a is slotted to provide a pair of oppositely disposed resilient fingers 83 and 84 which, in turn, provide the rim engaging shoulders 60a and 62a. As the clip 28a is moved into association with the rims of cans during

an assembly operation, the fingers 83 and 84 are flexed inwardly toward each other to permit the element 56a to be inserted between the cans. Then upon completion of the assembly operation, the fingers 82 and 84 spring outwardly to position the shoulders beneath the rims of the cans. It is to be understood that the clip 28a, which is only partially shown, is to be provided with a second locking element corresponding to the element 58 described above and formed in the same manner as the element 56a.

Figs. 6 and 7 show a clip structure 28b incorporating another modification of the present invention, which clip structure is similar to the devices described above as indicated by the application of identical reference numerals with the suffix "b" added to corresponding elements. In this embodiment, the body portion 46b is normally bowed, and locking means or elements 56b and 58b which are generally hook shaped extend laterally from opposite ends of the bowed body portion. The hook-like elements 56b and 58b have free opposite corner portions which provide the shoulders 60b and 62b and opposite edges 72b and 74b engageable with the peripheral surfaces of the can rims. Cooperatively disposed with respect to the hook shaped elements are fingers or tabs 52b and 54b having inner edges flaring from the edges 72b and 74b and curved so that they are complementary to the curved inner surfaces of the can rims. When the clip 28b is first applied to a pair of adjacent cans, the body portion 46b is flattened by pressure applied by the operator's finger or in any other suitable manner. This causes the hook shaped elements 56b and 58b to be shifted to the dotted line positions shown in Fig. 7, in which positions the hook shaped portions may be inserted between the cans. When the pressure is released the body portion springs back toward its original condition and the corners of the hook-like elements are shifted into engagement with the underside of the can rims and cooperate with the fingers 52b and 54b to establish a firm interlock between the clip and the containers.

In Figs. 9, 10 and 11 another embodiment of the present invention is shown, which embodiment is most similar to the clip 28 described above as indicated by the application of identical reference numerals with the suffix "c" added to corresponding elements. In this embodiment, increased flexibility is provided for the elements 56c and 58c by the use of upwardly projecting inverted U-shaped sections 86 and 88 for integrally connecting the elements 56c and 58c to the body portion 46c. When connecting this clip to a handle member 26c, the U-shaped sections 86 and 88 are inserted through openings in the handle member, and a locking wire 90 is inserted through apertures 92 and 94 in the U-shaped sections. The wire overlies the handle member and thus connects the clip to the handle member. It is to be understood that the wire may be extended for securing a plurality of the clips 28c to the handle member.

While the preferred embodiments of the present invention have been shown and described herein, it is obvious that many structural details may be changed without departing from the spirit and scope of the appended claims.

The invention is claimed as follows:

1. A can package comprising a one-piece resilient sheet material clip, and a plurality of cylindrical cans of the like having annular end rims disposed in side-by-side substantially abutting and parallel relationship securely retained by said clip, said rims having a predetermined thickness, said clip comprising generally planar horizontal body means substantially traversing an area of substantial abutment of the cans and spaces between the cans at opposite sides of said area, a plurality of first locking means integral with and depending from opposite end portions of said body means disposed in said spaces and presenting surfaces engaging beneath the rims of the cans, and a plurality of second locking means integral with

2,923,406

5

said body means having portions located toward opposite ends of and depending from said planar body means and engaging inner surfaces of the can rims and respectively cooperating with said first locking means, each cooperable pair of said first and second locking means having margins defining a throat which normally has a dimension transversely of a rim less than said rim thickness, one of said means comprising resiliently flexible spring means for relatively spreading said margins and opening said throats during assembly of the can package for receiving rims of cans disposed in substantially abutting parallel relationship sufficiently to enable said first locking means to be snapped beneath the can rims and for subsequently relatively shifting said margins together for closing said throats and locking the cans and the clip in assembled relationship so that the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart.

2. A can package, as defined in claim 1, wherein said one means comprising said spring means is one of each of said cooperable pairs of locking means and is provided with rim engageable cam means for effecting relative movement between cooperable first and second locking means for permitting entry of a rim between said

6

first and second locking means as an incident to the application of the clip to adjacent substantially abutting cans.

3. A can package, as defined in claim 2, wherein said cam means are integral with said first locking means, said first locking means being disposed to be shifted by said cam means laterally outwardly from said area of substantial abutment of the cans.

4. A can package, as defined in claim 1, wherein said body means is said spring means and is initially bowed and is resiliently deformable for shifting margins of cooperable first and second locking means relative to each other for opening and closing said throats.

References Cited in the file of this patent

UNITED STATES PATENTS

1,516,232	Kratzer	Nov. 18, 1924
1,800,109	Selig	Apr. 7, '931
2,090,477	Graham	Aug. 17, 1937
2,144,804	Irwin	Jan. 24, 1939
2,384,112	Meyer	Sept. 4, 1945
2,483,038	Curtis	Sept. 24, 1949
2,646,911	Holmberg	July 28, 1953

No. 21,068

United States Court of Appeals
For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,

Appellant,

VS.

REX L. BRUNSING, et al.,

Appellees.

APPELLANT'S REPLY BRIEF

CARL HOPPE,

ERNEST M. ANDERSON,

2610 Russ Building,

San Francisco, California 94104.

RICHARD R. TREXLER,

141 West Jackson Boulevard,

Chicago, Illinois 60604,

Attorneys for Appellant.

FILED

MAR 14 1967

MAR 20 1967

WM. B. LUCK, CLERK

Table of Cases

	Pages
Application of Tenney (CCPA 1958), 254 F.2d 619.....	16
Boyden Power Brake Co. v. Westinghouse (1898), 170 U.S. 537, 18 S.Ct. 707.....	8
General Motors Corporation v. Kesling (8 Cir. 1947), 164 F.2d 824	15
Graver Mfg. Co. v. Linde Co. (1949), 336 U.S. 271, 69 S.Ct. 535	12
Graver Mfg. Co. v. Linde Co. (1950), 339 U.S. 605.....	4
Hansen v. Colliver (9 Cir. 1960), 282 F.2d 66.....	5, 8
Hartford-Empire Co. v. U.S. (1945), 324 U.S. 370.....	15
McCullough v. Kammerer Corporation (9 Cir. 1948), 166 F.2d 759, Cert. Den. (1948), 335 U.S. 813.....	15, 16
Neff Instrument Corporation v. Cohu Electronics, Inc. (9 Cir. 1961), 298 F.2d 82.....	4, 8
No-Joint Concrete Pipe Co. v. Hanson (9 Cir. 1965), 344 F.2d 13, Cert. Den. (1965), 382 U.S. 843.....	9
Paper Bag Patent Case (1908), 210 U.S. 405.....	15, 16
Payne Furnace & Supply Co. v. Williams-Wallace Co. (9 Cir. 1941), 117 F.2d 823.....	10
Preformed Line Products Co. v. Fanner Mfg. Co. (6 Cir. 1964), 328 F.2d 265, Cert. Den. (1964), 379 U.S. 846....	15
Rail-Trailer Co. v. ACF Industries, Inc. (7 Cir. 1966), 358 F.2d 15	15
Sanitary Refrig'r Co. v. Winters (1929), 280 U.S. 30.....	4
Simons v. Davidson Brick Co. (9 Cir. 1939), 106 F.2d 518	7
Smith v. Mid-Continent Inv. Co. (8 Cir. 1939), 106 F.2d 622	17
Special Equipment Co. v. Coe (1945), 324 U.S. 370.....	15, 16
U. S. Chemicals Co. v. Carbide Corp. (1942), 315 U.S. 668	4

United States Court of Appeals For the Ninth Circuit

ILLINOIS TOOL WORKS, INC.,

Appellant,

vs.

REX L. BRUNSING, et al.,

Appellees.

APPELLANT'S REPLY BRIEF

Appellees controvert appellant's statement of the case on the basis of seven enumerated "particulars" (Appellees' Br. pp. 1 and 2). None of those "particulars" raises any real dispute of fact. Appellant contends that——

(1) it is a matter of semantics rather than substance whether the patented carriers of Holmberg and Poupitch "grip" the containers carried by them (Appellees' Br. pp. 1, 2, 10, 13, 17 19, 20). Unquestionably, both the patented carriers (as well as the accused devices) "engage" the bead edge of the containers which they support.

(2) appellees' point that Holmberg contemplates "various handles . . . but not other means for manually grasping the *body* to carry the containers" is also a difference without substance (Appellees' Br. pp. 2, 11). Significantly, claim 13 of the Holmberg patent broadly teaches "means

adapted for manual grasping for carrying the body", as the District Court noted in its Memorandum of Decision (C.T. 282, para. 5).

(3) the third "particular" of difference, that containers enclosed within a Poupitch structure may be freely removed without the necessity of spreading any portion of the clip apart (Appellees' Br. pp. 2, 10, 18, 19, 25-26), overlooks the specific teaching of Poupitch (PX 3, Col. 3, ll. 50-56) which provides:

"... After the clip and the cans have been fully assembled, the cans are positively retained in interlocked association with the clip and cannot be removed until either the flanges 52 and 54 or the elements 56 and 58 have been manually shifted outwardly in order to open the restricted throats 68 and 70 sufficiently to permit the rims to pass there-through. . . ."

In addition, claim 1 of Poupitch further provides:

"... the cans cannot be thereafter removed from the clip until said margins have again been relatively shifted and spread apart."

The "particulars" specified in enumerated paragraphs (4), (5), (6) and (7) are of no greater importance than the others. Appellees' contentions that the accused device is not "like" the Holmberg or Poupitch structures; that the "tongues" of the accused device do not "depend" from the body of the clip; that the margins between the tongue and the rib of the accused device define a vertical space rather than a horizontal slot; and that, although the accused devices hold a pair of cans so they abut each other at the bottom edges, they do not counterbalance

each other raise no issues of fact. The precise construction of appellees' device is shown as an insert opposite page 12 of their brief, and that construction is the same as appellant's illustrations of the accused device, shown on pages 6, 12, 16, 17 and 27 of Appellant's Opening Brief. There is no dispute as to the manner in which appellees' device operates and the patents speak for themselves.

Appellees suggest, p. 3, that the accused device avoids infringement by providing a "gripping" action whereas devices of the patented structures merely support and carry the cans. Appellant's reply to this point appears on pages 17, 18, 19 and 27 of Appellant's Opening Brief.

Although appellees repeatedly assert that the accused structure is an embodiment of a wholly different idea and concept, they ignore the physical structure which *speaks* for itself. It shows that it has slots for receiving the rims of containers; that the body portions along the bottom edges of the slots are positioned to supportingly engage the under surface of the rims of the containers; that body portions along the top edges of the slots engage the inner surfaces of the container rims and maintain the under surfaces of said rims in engagement with the body portions along the lower edges of the slots; that portions of the carrier below the slots are curved to conform to the contour of the side walls of the containers; that portions of the carrier above the slots are also curved to conform to the contour of the container surfaces of the rims; that the slots are oppositely disposed so that an even number of containers will balance the carrier; and that a pair of cans mounted in an inter-dependent set of

slots or can-holding devices contact each other adjacent the bottom edges. No amount of rhetoric can change that.

Appellees state no sound reason why the additional use of a resilient member to hold the chimes or rims of containers should avoid infringement. An operational difference stemming from the use of a resilient tongue is at best no more than an improvement of the Holmberg patent. Accused devices do not escape infringement by merely adding features if they otherwise adopt the basic features of the patent [*Neff Instrument Corporation v. Cohu Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82].

Appellees' suggestion that the legal question of infringement can or should be settled as a factual matter is not supported by *Graver Mfg. Co. v. Linde Co.* (1950), 339 U.S. 605, quoted at length on pages 4-6 in appellees' brief. In that case there was a factual issue as to "whether the substitution of the manganese which is not an alkaline earth metal for the magnesium which is, . . . is a change of such substance as to make the doctrine of equivalents inapplicable." Appellees' attack on the reliability of testimony given by plaintiff's witness Poupitch, pages 7 and 8 of appellees' brief, is unwarranted in fact and in law. In fact, the testimonies of Mr. Poupitch and Mr. Wood are not in conflict. In law, the personal attack is beside the point on this appeal. Here, appellees do not discuss any factual dispute in this case which, if resolved in their favor, would avoid infringement. Here, the disputed issues are based on principles of claim construction and are legal rather than factual [*Sanitary Refrig'r Co. v. Winters* (1929), 280 U.S. 30, 36. Cf. *U.S. Chemicals Co. v. Carbide Corp.* (1942), 315 U.S. 668, 678].

Appellees argue, pages 8-10, that the accused structures avoid infringement since they do not include a body having a U-shaped cross-section. That issue, appellees contend, "could have been resolved by the District Court without any oral testimony whatsoever merely by viewing the drawings and exhibits and drawing its own conclusion." Appellant agrees. It is not a matter which requires expert testimony. Appellant readily admits that the U-shaped cross-section of the accused clip is not identical to the inverted U-shape shown in the Holmberg patent, but it is appellant's position that such a slight difference is immaterial. Functionally, the shapes are equivalent, as pointed out in Appellant's Opening Brief, pages 11-14.

Even assuming for sake of argument that a cross-section of the accused clip (shown in Fig. 6 opposite to page 12 in appellees' brief) is not U-shaped, still there is literal infringement of claims 4, 11, 12 and 13, none of which recites a carrier body having a U-shaped cross-section. The law on this point was clearly recognized in *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66, where this court specifically referred "to the well established rule of construction that a broad claim will not be construed to contain limitations expressed in the more narrow claims. (citations omitted)."

Appellees argue, page 10, that the patents in suit should be limited to the form of the invention shown since the form of the invention is "*necessary to the functions which the patent ascribes to the invention*", citing Walker on Patents. Specific reference is made to the use of "slots" in Holmberg and "throats" in Poupitch to support the containers. The argument is not germane. Here, the ac-

cused device also has slots which function in precisely the same manner. The fact that Holmberg's specification describes one manner by which slots may be formed in the body of a carrier is no basis for limiting both that patent and the Poupitch patent. It is the function of the slots which is important, not the manner in which they are formed.

Appellees' argument, page 11, that a freely pivotal handle member is essential to the invention of Holmberg is covered on pages 19 to 21 of Appellant's Opening Brief. Appellees' further attempt to limit even the Poupitch invention to structures using only freely pivotal handle members is equally unsound. This, because Poupitch does not even have a pivoted bail-like handle, but it illustrates and describes a carrier having a handle 26 with finger openings 40 and 42. Such "handle means" is essentially the same as the carrier body and finger openings of the accused device. In Holmberg, Poupitch and Brunsing alike, the carriers are held from the top and the containers remain in an essentially vertical position. Fingers inserted through a bail or openings in a carrier body like that of Poupitch (or of the accused device) pivotally support the package in the same manner. Indeed, appellees' expert, Mr. Wood, testified that a "handle" could be something that is grasped by the fingers as well as the hand (R.T. 551-552), and appellees' own literature shows that the accused devices are intended to be carried vertically rather than at some other and unnatural angle (PX 31 and 32).

Appellees' legal argument, pages 13-16, under the heading "The Omission Of An Element From A Combination

Patent Avoids Infringement'' considers the doctrine of equivalents. But, appellees fail to show how, why, or in what manner *Simons v. Davidson Brick Co.* (9 Cir. 1939), 106 F.2d 518, or any other cited authority, applies to the structures in this case. Appellees do not state what element or elements of the claims (or their equivalents) cannot be found in the accused structure. Appellant submits the matter on the argument of Appellant's Opening Brief, pages 11 through 21 and 23 through 29.

Under the heading "The Addition Of 'Snap Action' Adds No Substance To Appellant's Case'', pages 16-20, appellees direct their argument to non-infringement of the Poupitch patent. Appellees contend that a Poupitch carrier retains cans or containers as in Holmberg and allows the cans "to pass freely in and out of his structure when the cans are at an intermediate angle to the carrier", citing R.T. 365, ll. 5-11.

At the cited reference, Mr. Poupitch testified under cross-examination with regard to one specific exemplar of the Poupitch clip and with respect to that particular clip he testified:

"Q. What I am trying to get at is this, Mr. Poupitch: That can comes out of your clip freely, does it not?

"A. It came out reasonably freely, yes.

"Q. And it goes in the same way?

"A. Yes."

There was no evidence linking this testimony to other embodiments of the Poupitch invention. The face of that patent shows that it is not directed to a concept which allows the can "to pass freely in and out of the structure

when . . . at an intermediate angle." Appellee's unwarranted inferences to the contrary are conclusively contradicted by the patent specification, quoted on page 2 of this brief.

Appellees also argue, page 17, that the accused devices differ from the patented structures of Holmberg and Poupitch by reason of a third can-holding element. They assert that the third element maintains a gripping action "and it becomes essential when the device is turned to the angle where the cans will drop out of Holmberg and Poupitch". Since appellees must admit that the accused device uses the two can-holding elements of the patented structures, their attempt to avoid infringement on the basis of an improved result occasioned by adding a third can-holding element should be rejected. [*Neff Instrument Corporation v. Cohu Electronics, Inc.* (9 Cir. 1961), 298 F.2d 82, 89-90].

Appellees urge, page 20, that the doctrine of equivalents should not be applied when the means and operation of the accused device are basically different. The case of *Boyden Power Brake Co. v. Westinghouse* (1898), 170 U.S. 537, 18 S.Ct. 707, is simply not in point. In that case there was a complete departure from the patented structure. Appellees' accused devices infringe not simply because they derive the same results as the patented devices, but because the results are obtained by essentially the same can-holding engagements as the patented devices.

Appellant submits that the undisputed facts of this case compel the application of the doctrine of equivalents for the same reasons given in *Hansen v. Colliver* (9 Cir. 1960), 282 F.2d 66. In that case, and even though the District

Court found that the table top of the accused device was not a "guide" as called for by the patent claims, this Court held, page 69:

"... While we are inclined to disagree with the view of the district court that the table top of the appellees' device is not a guide and therefore does not literally infringe appellant's patent, we are wholly satisfied that the undisputed facts compel the application to this case of the doctrine of equivalents. The doctrine is applicable if the accused device performs substantially the same function in substantially the same way to obtain the same result as that claimed for the patented device. (citations omitted)."

"Normally, the question of infringement is one of fact. In this case, however, since the facts are not in dispute the question of infringement resolves itself into one of law, depending on a comparison between the patent claim in issue and the accused device, and the correct application thereto of the law of equivalency. (citations omitted)."

Appellees' argument, pages 21 through 26, relating to the doctrine of the file wrapper estoppel and its application to the **Holmberg** and **Poupitch** patents, is submitted generally on pages 21-23 and 29-30 of Appellant's Opening Brief. The text book views which appellees cite from *Corpus Juris Secundum* have no application to the prosecution history of either patent in suit and should, in any event, take a back seat to the views of this Court as expressed in *No-Joint Concrete Pipe Co. v. Hanson* (9 Cir. 1965), 344 F.2d 13, cert. den. (1965), 382 U.S. 843.

Some eight claims were cancelled in **Holmberg** during the patent prosecution. None of those claims was can-

celled by reason that the invention was limited to the action of gravity; or that a patented device allowed a free entrance and exit of a container at an intermediate angle; or that the patented device provided a free downward swinging action for seating the containers; or that such devices provided a free upward swinging action to accomplish removal. Moreover, none of the patent claims was amended during the patent prosecution for purposes of obtaining an allowance on the basis of such functions.

With regard to the Poupitch patent and the law of file wrapper estoppel, pp. 22-26, appellees attempt to distinguish *Payne Furnace & Supply Co. v. Williams-Wallace Co.* (9 Cir. 1941), 117 F.2d 823 on the mere basis that that case involves a situation of validity rather than infringement. Even so, the principle is the same, for the problem under review is one of claim construction.

Appellee's argument, page 24, that abandoned claim 14 of Poupitch contained the same elements as allowed claims 1 and 2 ignores the fact that claim 14 called for "a plurality of clips as defined in claim 8, connected to said handle member in spaced relationship". It was by reason of this *further* recitation that the District Court applied what it stated to be the doctrine of file wrapper estoppel (C.T. 280, Finding of Fact XIX). The District Court recognized that claim 14 differed from claims 1 and 2. It applied the wrong legal principle when it held that the doctrine of file wrapper estoppel limited the invention to a single clip without a handle. This holding was in conflict with the authorities cited in Appellant's Opening Brief, page 30. Appellees cite no contrary authority and appellant is aware of none. As a matter of fact, the patent

includes in Fig. 8 the very handle which the District Court wrote out of the claims.

Appellees' argument, pages 24-25, has no bearing either on the application of the doctrine of file wrapper estoppel or on any real issue presented by this appeal. In fact, it is impertinent to impugn Mr. Poupitch's ability to draw a clip coming under the teaching of his patent and which "would hold more than two cans". He was merely following instructions. Appellees' counsel initiated the making of the drawing during cross-examination, and particularly instructed Mr. Poupitch as to what features he should and should not draw (R.T. 216-221). The demonstration was concluded with counsel's statement:

"Q. It's not necessary to draw in the tongues. I think everybody understands how it works." (R.T. 221).

Appellees' remarks, page 25, concerning the patent prosecution of the Poupitch patent specifically refer to the fact that the Examiner "first objected to claim 1" and the fact that "the Trexler Firm elected '. . . to prosecute claims drawn to the specifications shown in figures 1-3' ". Those remarks are both misleading and inaccurate.

The Examiner's "objection" as to the inferential inclusion of a plurality of cans was traversed in the following amendment and claim 1 then issued *without limitation*, fully contemplating a can package including "a plurality of cylindrical cans or the like having annular end rims disposed in side-by-side substantially abutting and parallel relationship" (PX 3, col. 4, ll. 64-66). Applicant traversed the "objection" on the basis that a reference to a

plurality of cans "greatly facilitates the definition of the novel structure so that the claims are more definite and more easily understood" (DX U, page 30). Thus, in allowing the claim, the Examiner approved the claim because it covered a plurality of cans.

Fig. 8 of the Poupitch patent shows the Poupitch structure supporting six cans in the same manner as the accused clip of appellees. Both are used as a "six pack."

Applicant's election of species, page 25, had nothing at all to do with limiting the invention to "only one clip which supports only two cans" as suggested by appellees. The election was based on the Examiner's requirement for an election as to "the species of Figures 1, 4, 6 and 9" (DX U, page 26). No election was required as to the illustration of Fig. 8, which shows a plurality of clips, since that figure is general and relates to all "species"; it is not itself a "species" of the invention. Fig. 8 merely illustrates how a plurality of clips might be used to form a package irrespective of whether the clip was constructed according to the "species" shown in Figs. 1, 4, 6 or 9.

Appellees' point, page 25, that claim 4 of the Poupitch application was withdrawn from examination by the Examiner is also misleading. The claim was eventually allowed as claim 4 of the Poupitch patent. No charge of infringement has been made as to claim 4 but there is no legal basis for holding that failure to charge a device as an infringement of one claim (such as claim 4) avoids infringement of other patent claims (such as claims 1 and 2 of Poupitch). Patent claims are to be read separately [*Graver Mfg. Co. v. Linde Co.* (1949), 336 U.S. 271, 69 S. Ct. 535, 538].

Much to appellant's embarrassment, appellees' brief correctly points out, page 26, that appellees' patent expert, Mr. Wood, gave more testimony on the prior art than recognized in **Appellant's Opening Brief**. Appellant apologizes to the Court and to counsel for any inconvenience counsel's oversight may have occasioned. The point, however, remains unchanged. The additional testimony, previously overlooked by appellant's counsel in reviewing the Reporter's Transcript, consisted of statements identifying the issue dates of six prior art patents, followed by a brief description of what each patent teaches.

All six of the foregoing patents are included in the book of prior art mentioned in Appellant's Opening Brief. It is significant that appellees do not relate any of these six essentially non-analogous patents to any claims of the patents in suit, either by way of expert testimony or argument, and do not present any cogent reason why the claims should be limited on the basis of such teachings.

Appellees state, page 27, that "it was up to the Court to determine from the testimony and from the patents what was in fact the state of the prior art". Appellant agrees. It is significant that the Court did not limit the claims of either patent in suit by reason of the prior art. Indeed, the District Court found that "plaintiff's combination patents in suit were improvements" (C.T. 277). The Court's legal conclusion that the accused device does not infringe either patent in suit was made on specific enumerated "differences", each particularly set forth in Findings of Fact XXI and XXII (C.T. 281-284). None of those differences was justified on the basis of prior art. The Court's Memorandum shows that the "differences"

were primarily based upon an improper use of file wrapper estoppel. In addition, the Court erred by considering all claims together, rather than as separate specifications of invention, and by limiting the claims to the specific forms of carriers illustrated in the patents in suit.

Appellees argue, pp. 27-29, that the claims of the patent should be limited since appellant has not commercialized the patented structures. Appellant's argument on this point is set forth on pages 32 through 34 of Appellant's Opening Brief.

In support of its argument appellees rely on the testimony of Mr. Poupitch as showing that appellant made "very few" of the patented devices. The particular testimony at R.T. 127-129, relied upon by appellees, merely shows that the witness did not "know of any machine" for making a specific exemplar of Holmberg, namely Defendants' Exhibit D. That testimony is hardly support for the proposition that the Holmberg patent was not commercialized by plaintiff. The clerk's transcript shows that Illinois Tool Works, Inc. manufactured approximately 1,000,000 of the patented Holmberg container carriers (C.T. 185). Although such carriers were not of the specific form shown in the drawings, their manufacture is at least more than a modest commercial use of the invention. Mr. Holmberg's testimony (R.T. 139-140) does not contradict this fact; it simply indicates that at one point in time Mr. Poupitch had been told that appellant decided not to commercialize them "for the time being" (R.T. 140).

Appellees further argue, page 28, that the District Court was "justified in applying a narrow rather than a broad range of the doctrine of equivalents" on the au-

thority of *General Motors Corporation v. Kesling* (8 Cir. 1947), 164 F. 2d 824. Appellant respectfully submits that the *General Motors* case is no authority for the proposition that claims of a patent may be restricted upon the argument that a patentee has not commercialized his invention. As a matter of fact, in that case the Kesling invention was held not to be a "paper patent" and the patent was *not* narrowly construed (164 F. 2d 828). The Court found that even though there was a difference in the method by which the accused device operated compared with the device described in the patent, and even though the "accused may be the better structure", still the patent was infringed.

For the sake of argument, we may assume that appellant's manufacture of 1,000,000 devices may not be an impressive commercial use of the Holmberg invention. But this alone should not deprive the owner of a patent of those rights given to him by law. Nothing in the Patent Statute would justify or warrant an arbitrary limitation of a patent simply on the basis that there was no impressive commercial use. This is established by the *Paper Bag Patent Case* (1908), 210 U.S. 405, cited in Appellant's Opening Brief. That case is the leading case for the proposition that failure of the patentee to make use of a patented invention does not affect the validity or scope of a patent. *Special Equipment Co. v. Coe* (1945), 324 U.S. 370, 379; *Hartford-Empire Co. v. U.S.* (1945), 323 U.S. 386, 417; *McCullough v. Kammerer Corporation* (9 Cir. 1948), 166 F. 2d 759, 767, cert. den. 335 U.S. 813; *Preformed Line Products Co. v. Fanner Mfg. Co.* (6 Cir. 1964), 328 F. 2d 265, 279, cert. den. 379 U.S. 846; *Rail-Trailer Co. v. ACF Industries, Inc.* (7 Cir. 1966), 358 F.

2d 15, 16; and *Application of Tenney* (CCPA 1958), 254 F. 2d 619, 623.

In *Special Equipment Co. v. Coe* (1945), 324 U.S. 370, the Supreme Court reversed *Special Equipment Co. v. Coe* (D. of C. Cir. 1944), 144 F. 2d 497. There, the Court of Appeals denied a claim to a subcombination invention for the reason “. . . that appellant’s purpose in making a distinct patent claim on the subcombination is not to stimulate the commercial development or financial return from that patent. . . .” (144 F. 2d 498). The Court, page 499, rejected the *Paper Bag Patent Case* “because we believe that its principle, which is inconsistent with the constitutional provision that the patent law ‘promote science and the useful arts,’ has been overruled by subsequent decisions. . . .” A lengthy quote taken from the Supreme Court decision which answered that reasoning and overruled the Court of Appeals on that very issue is set forth in Appendix A of this brief.

This Court has followed the *Paper Bag Patent Case* in the past and there is no reason for it to depart from its authority now. In *McCullough v. Kammerer Corporation*, 166 F. 2d 759, 766, this Court said:

“The law does not *compel* a patent owner to *sell* his patent. Aside from entering into *contracts not to use an invention*, which are a restraint of trade, the patent owner may refrain from doing anything at all with his patent—its validity is not affected by his non-use. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 28 S.Ct. 748, 52 L.Ed. 1122.”

Appellees make no attempt to distinguish the *Paper Bag Patent Case* from the facts of this case, nor do they

cite any contrary authority which might support their position. Appellees argue that *Smith v. Mid-Continent Inv. Co.* (8 Cir. 1939), 106 F. 2d 622, cited in Appellant's Opening Brief, does not support the principle that "paper patents" are entitled to protection. Appellant's Opening Brief, pp. 32-35, cites *Smith* only for the proposition that a patent does not become a "paper patent" merely because the owner does not use the constructions shown in the drawings and described in the specification.

In three brief sentences, page 29, appellees submit their case that the accused device lacks essential elements of the patented devices. They rest their case in part upon a reference to Mr. Wood's testimony under direct examination; an inference that the Court was "Obviously . . . impressed with Mr. Wood's testimony, the demonstrations, and the various objects of real evidence introduced by defendant"; and the conclusion that the testimony supports Findings of Fact XII, XXI and XXII.

With regard to the construction and operation of the accused device, in comparison with the patented structures, Mr. Wood made it abundantly clear that the accused device did in fact include the essential elements of the claims. The particulars in which he did so are collected in a schedule included in Appendix B to this brief.

Appellant submits that the substance of testimony given by appellees' own expert shows that the accused device embodies the inventions as claimed in both of the patents in suit. The accused devices, like Hohnberg, are of the type where a plurality of cans "are held by the upper rim and the downward swinging action brings about an abutment at the bottom edge of the can . . ." (DX V, p. 32);

and they, like Poupitch, are “adapted to be resiliently snapped onto a plurality of rims of adjacent containers in a manner which provides a positive interlock between the clip and the containers so as to prevent subsequent removal of the containers until portions of the clip have been spread apart.” (PX 3, col. 1, ll. 35-40).

In conclusion, appellant submits that the judgment below should be reversed on the issue of infringement and the cause should be remanded to the District Court for trial of the issue of validity.

CARL HOPPE,
 ERNEST M. ANDERSON,
 RICHARD R. TREXLER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL HOPPE,
Attorney for Appellant.

(Appendices A and B Follow)

Appendices A and B

Appendix A

Excerpt from *Special Equipment Co. v. Coe* (1945), 324 U.S. 370, at pages 377-379:

“In answering it the court below assumed that such purpose to protect the whole invention was to be achieved by complete suppression of the use of the subcombination invention and that the suppression for the protection of the complete machine would invalidate the patent because it would be contrary to the constitutional purpose and to the spirit if not the letter of the patent laws. We think both assumptions are unwarranted. Section 4886 of the Revised Statutes (now Section 101 of U.S. Code, Title 35) authorizes ‘any person who has invented . . . any new and useful . . . machine’ to ‘obtain a patent.’ The patent grant is not of a right to the patentee to use the invention, for that he already possesses. It is a grant of the right to exclude others from using it. As the statute, R.S. § 4884, provides, the grant is of the ‘exclusive right to make, use, and vend’ the invention, and this includes the exclusive right to license others to make, use and vend it. By the very terms of the statute the grant is nothing more than a means of preventing others, except under license from the patentee, from appropriating his invention.

“It by no means follows that such a grant is an inconsistent or inappropriate exercise of the constitutional authority of Congress ‘to promote the Progress of Science and useful Arts’ by securing to inventors ‘the exclusive Right to their . . . Discoveries.’ Congress, in the choice of means of promoting the useful arts by patent grants, could have provided that the grant should be conditioned upon the use of

the patented invention, as in fact it did provide by the Act of 1832 (4 Stat. 577) authorizing the issue of patents to aliens conditioned upon the use of the invention, which provision was later repealed (5 Stat. 117, 125). But Congress was aware that an unpatented invention could be suppressed and the public thus deprived of all knowledge or benefit of it. It could have concluded that the useful arts would be best promoted by compliance with the conditions of the statutes which it did enact, which require that patents be granted only for a limited term upon an application fully disclosing the invention and the manner of making and using it. It thus gave to the inventor limited opportunity to gather material rewards for his invention and secured to the public the benefits of full knowledge of the invention and the right to use it upon the expiration of the patent.

“This Court has consistently held that failure of the patentee to make use of a patented invention does not affect the validity of the patent. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405; *Crown Die & Tool Co. v. Nye Tool Works*, 261 U.S. 24, 34; *Woodbridge v. United States*, 263 U.S. 50, 55; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127; *Hartford-Empire Co. v. United States*, 323 U.S. 386, 433. . . .

“Congress has frequently been asked to change the policy of the statutes as interpreted by this Court by imposing a forfeiture or providing for compulsory licensing if the patent is not used within a specified time, but has not done so.” (footnotes omitted).

Appendix B

Schedule of Mr. Wood's Testimony Referred to in the Brief, page 17, to the Effect That:

1. The term "slot" is a fair definition of the space between the tongue and rib of the accused device (R.T. 547, ll. 23-25);

2. The slots are formed in the body of the accused device and there are two of them at the cross-section (R.T. 548, ll. 1-5);

3. The slots formed in the accused device are on opposite sides of the body (R.T. 537, ll. 5-9);

4. The accused device provides vertical support of the cans from one lip of the slot or one margin of the slot (R.T. 548, ll. 21-23);

5. The lower margin of the slots supports the bead of the can (R.T. 541, ll. 4-9);

6. The slots of the accused device are disposed in pairs on equal distances from the central plane (R.T. 582, ll. 20-24);

7. "... the same result is reached (in Brunsing as in Holmberg) in the general sense that you have vertically disposed containers attached to a carrier . . ." (R.T. 472, ll. 10-11);

8. "... in Brunsing you have the 'inside and outside can engaging means sufficiently close together to prevent the disengagement,' " (R.T. 472, ll. 4-6);

9. "... in Brunsing the cans, when they are carried, abut each other." (R.T. 466, ll. 20-21);

10. In the Brunsing clip, the action of gravity increases the pressure engagement between the cans at the bottom (R.T. 568, ll. 13-18);

11. Cans may be assembled in the Brunsing clip "at an angle to the axis of the can" (R.T. 455, ll. 12-20);

12. Lifting a package of cans in the Brunsing clip, through the action of gravity, causes the cans to move together (R.T. 572, l. 20-R.T. 573, l. 1);

13. In the Brunsing clip, the effect of gravity acting on "each of two opposed can is the same" and in that sense the forces of gravity counterbalance one another (R.T. 587, l. 14-R.T. 588, l. 4);

14. The cans in the Brunsing clip must be tilted upwardly in opposition to the action of gravity for removal (R.T. 585, ll. 12-24).

15. The tongues of the Brunsing clip are resilient elements (R.T. 505, ll. 18-20).

16. When the tongues of the Brunsing clip are spread apart from the rib, they move to increase the space between the engaging end of the tongue and the central rib (R.T. 512, ll. 19-24).

17. The tongues of the Brunsing clip move a distance sufficient so that there is enough space to accommodate the thickness of a can rim or chime (R.T. 512, l. 25-R.T. 513, l. 4).

